HUGONIS GROTII

DE JURE BELLI ET PACIS

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DE JURE BELLI ET PACIS

LIBRI TRES

ACCOMPANIED BY AN ABRIDGED TRANSLATION

BY

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LIBER TERTIUS.

HUGONIS GROTII

DE JURE BELLI AC PACIS.

LIBER TERTIUS.

CAPUT I.

QUANTUM IN BELLO LICEAT, REGULÆ GENERALES EX JURE NATURÆ: UBI ET DE DOLIS ET MENDACIO.

I. *Ordo sequentium.*

II. *Regula prima: licere in bello quæ ad finem sunt necessaria: explicatur.*

III. *Secunda: jus non tantum ex principio, sed et causis in bello subnascentibus spectari.*

IV. *Tertia: quædam consequi sine injuria quæ ex proposito non licerent: cui cautio additur.*

V. *Quid liceat in eos qui hostibus res subministrant, per distinctiones explicatur.*

VI. *An dolo uti in bello liceat.*

VII. *Dolus in actu negativo per se non est illicitus.*

VIII. *Dolus in actu positivo distinguitur in eum qui fit per actus libere significantes, et per actus significantes velut ex conventione: et ostenditur dolum prioris generis licitum esse.*

IX. *In secundo genere indicatur quæstionis difficultas.*

X. *Non omnem usurpationem locutionis quæ sciatur in alium sensum accipienda, esse illicitam.*

XI. *Mendacii qua illicitum est formam consistere in repugnantia cum jure alterius, quod explicatur.*

XII. *Et ostenditur licitum esse falsum loqui apud infantes et amentes:*

XIII. *Et cum is decipitur ad quem sermo non est, et quem extra sermonem decipere liceret:*

XIV. *Et cum sermo est ad eum qui velit ita decipi:*

XV. *Et cum qui loquitur utitur jure supereminente in sibi subditum:*

XVI. *Forte et cum vitam innocentis aut par aliquid tueri aliter non possumus.*

XVII. *Apud hostes licitum falsiloquium qui senserint auctores.*

XVIII. *Non extendendum hoc ad verba promittentia.*

XIX. *Nec ad juramenta.*

XX. *Generosius tamen esse, ac Christianæ simplicitati convenientius, falsiloquio in hostem quoque abstinere: quod per similia illustratur.*

XXI. *Non licere nobis quenquam impellere ad id quod nobis licet, ipsi non licet.*

XXII. *Licere tamen uti opera ultro oblata.*

I. ET qui bellum gerant, et quibus ex causis belligerare liceat vidimus. Sequitur, expendamus [a] quid quantumque in bello liceat, et quibus modis: quod aut nude spectatur, aut ex promisso antecedente. Nude, ex naturæ primum, deinde ex gentium jure. Quid ergo natura liceat videamus.

Vict. *de Jure Belli*, n. 15.

II. 1 Primum, ut jam ante diximus aliquoties, ea quæ ad finem ducunt in morali materia, æstimationem intrinsecam accipiunt ab ipso fine: quare quæ ad finem juris consequendi sunt [1] necessaria, necessitate sumta non secundum physicam subtilitatem sed moraliter, ad ea jus habere intelligimur. Jus dico illud quod stricte ita dicitur, et facultatem agendi in solo societatis respectu significat. Quare si vitam aliter servare non possum, licet mihi vi qualicumque arcere eum qui eam impetit, etiamsi forte is peccato vacet, ut notavimus alibi: quia jus hoc non proprie ex peccato alterius oritur, sed ex jure quod mihi pro me natura concedit.

[a] *Quid quantumque in bello liceat*] Bene Augustinus Epistola LXX. *ad Bonifacium* comitem: (Ep. 220 in fin. *Edit. Benedict.*) *ut in ipsis bellis (si adhuc in eis versari te opus est) fidem teneas, pacem quæras.* Epistola CCV. (189. § 6.) *Esto ergo etiam bellando pacificus.* De justitia in bello gerendo servanda dissertatio est egregia Belisarii ad milites apud Procopium *Vandalicorum* IV. (cap. 16.) Orosius libro VII. *Ecce regibus et temporibus Christianis, qualiter bella civilia, cum vitari nequeunt, transiguntur.* Idem de Theodosio:

CHAPTER I. *General Rules as to what is lawful in War by Natural Law; and herein of deceit and falsehood* [*in War.*]

I. We have seen who may carry on war, and from what causes they may do it lawfully. It follows that we consider what is lawful in war, and to what extent; and this is to be considered either nakedly, or as depending on antecedent promise: and nakedly, first by Natural Law, and next by the Law of Nations. Let us then see what is allowed by Natural Law.

II. 1 First, as we have already repeatedly said, the means which lead to an end in a moral matter receive their intrinsic value from the end: wherefore the steps that are necessary [to a lawful end], *necessity* being taken not in physical exactness but morally, we have a right to use. By Right, I mean Right taken strictly, such as implies a competence to act in respect of society alone. Wherefore, if I cannot otherwise preserve my life, I may, by any force which I can use, repel him who assails it, even if he be without fault; as we have elsewhere noted: because this right does not properly arise from the fault of another, but from the right which nature gives me for my own preservation.

2 Further, I may take possession of a thing belonging to another,

2 Quin et rem alienam, ex qua certum mihi periculum imminet, citra culpæ alienæ considerationem invadere possum: non tamen dominus fieri (id enim ad eum finem accommodatum non est) sed custodire, donec securitati meæ satis cautum sit: quod ipsum quoque tractatum est a nobis alibi. Sic rem meam quam alius detinet eripere ei naturaliter mihi jus est: et si id difficilius, aliud tantundem valens: ut et debiti consequendi gratia: quibus ex causis dominium quoque sequitur, quia alio modo læsa æqualitas reparari nequit.

Vict. *de Jure Bell.* n. 18. et 39. et 55.

Lib. ii. 11. § 10.

Silv. *in Verb. Bell.* p. 1. n. 10. v. *prima.*

3 Sic ubi justa est punitio, justa etiam vis omnis, sine qua ad pœnam veniri non potest: et omne quod pœnæ pars est, ut rerum corruptio per incendium aut aliter, intra justum scilicet et qui peccato respondeat modum.

III. Sciendum secundo est: jus nostrum non ex solo belli principio spectandum, sed et ex causis subnascentibus, sicut et in judiciis post litem contestatam jus sæpe parti novum

unum aliquod ab initio urbis conditæ bellum proferant, tam pia necessitate susceptum, tam divina felicitate confectum, ubi nec pugna gravem cædem, nec victoria cruentam exegerit ultionem. (Cap. 21 et 23. *Edit. Paris.* 1506.)

[1] Agitur heic de rebus, quæ quidem alias fieri non possent, extra connexionem quam habent cum illo fine, sed tamen non sunt ex numero earum, quæ natura sua, adeoque perpetuo malæ sunt, quocumque consilio fiant. Vide infra § 6, in fin. Plura diximus in Notis nostris Gallicis. *J. B.*

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from which a certain danger impends over me, without consideration of another's fault: not however so as to become the owner of it, (for that is not a step suitable to the end,) but to keep it till sufficient provision is made for my security: which question we have also elsewhere treated. So by Natural Law I have a right to take from another a thing of mine which he detains; and if that is too difficult, another thing of the same value: and the like I may do for the sake of recovering a debt: and in this case my ownership also is consequent, because the equality which has been disturbed cannot be restored in any other way.

3 So also when punishment is just, all force is just without which punishment cannot be attained: and every thing which is part of the punishment, as the destruction of property by burning or otherwise; that is, within just limits, corresponding to the offense.

III. It is to be noted in the second place, that these rights are not only to be regarded with reference to the origin of the war, but also with reference to causes *subnascent*, that is, growing up during the progress of the war: as also in civil suits, after the point in dispute is dealt with, there often arises a new right to the party. Thus those who join themselves to the party which attacks me, whether as

paritur. Sic qui se aggregant me impetenti, sive socii sive subditi, in se quoque jus tuendi me mihi porrigunt. Sic qui bello se miscent quod injustum est, præsertim si ipsi id injustum esse scire possunt ac debent, obligant se ad sumtus et damna resarcienda, quia culpa damnum dant. Sic qui bello sine probabili ratione suscepto accedunt, ipsi quoque pœnæ meritum contrahunt, pro ratione injustitiæ quæ ipsorum actui inest. *De Rep.* v. p. 471 B. Ita Plato probat bellum *μέχρι οὗ ἂν οἱ αἴτιοι ἀναγκασθῶσιν ὑπὸ τῶν ἀναιτίων ἀλγούντων δοῦναι δίκην, donec hi qui sontes sunt cogantur insontibus malo affectis pœnas dare.*

IV. 1 Observandum tertio, [b]ad jus agendi multa consequi indirecte et extra agentis propositum, ad quæ per se jus non esset. *Vict. d. lib. num.* 37. [Lib. II. c. i. § 4, add. ej. l. c. xxi. 9, 10, et c. xxvi. § 6] [V. Lib. II. c. vii. § 2, et modo § 2, n. 2.] In sui defensione quomodo id locum habeat explicavimus alibi. Sic ut nostrum consequamur, si tantundem accipi non potest, plus accipere nobis jus est, sub obligatione tamen restituendi pretium ejus quod redundat. Sic navis piratis plena, aut domus latronibus, tormentis peti potest, etiamsi intra eandem navem aut domum sint pauci infantes, mulieres, aut alioqui innocentes quibus inde creetur periculum. *Ad Publ. Epist.* 154. *Nec reus est mortis alienæ*, inquit Augustinus, *qui suæ possessioni*

[b] *Ad jus agendi multa consequi indirecte et extra agentis propositum*] Vide hac de re Thomam prima secundæ, quæstione LXXIII. art. 8. Molinam tractatu secundo, disputatione CXXI.

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allies or as subjects, give me a right of defending myself against them. So again those who mingle themselves in a war which is unjust, especially if they may know and ought to know that it is unjust, become bound to make good the expense and damage, because they occasion damage with fault. Thus too, those who join in a war undertaken without a plausible reason, incur the desert of punishment, in proportion to the injustice which belongs to their act. So Plato approves a war carried on *till those who are guilty are compelled to undergo penalties to the satisfaction of the innocent who suffer by it.*

IV. 1 It is to be observed in the third place, that upon the right of thus acting, many consequences follow indirectly and extraneously to the intent of the actor, to which of themselves he would not have a right. How this holds in self-defense we have elsewhere explained. Thus in order to recover what is ours, if we cannot take exactly so much, we have a right to take more; under the obligation however of restoring the excess of value. Thus a ship occupied by pirates, or a house by robbers, may be battered to pieces, although there may be in the ship or in the house a few infants or women, or other innocent persons who may thus be put in danger. *He is not*

murorum ambitum circumduxit, si aliquis ex ipsorum usu [lege *casu.* J. B.] *percussus intereat.*

2 Sed sicut antehac monuimus sæpe, non semper ex omni parte licitum est quod juri stricte sumto congruit; sæpe enim proximi caritas non permittet ut summo jure utamur. Quare etiam quæ extra propositum accidunt, et accidere posse prævidentur, cavenda erunt, nisi multo majus sit bonum quo nostra actio tendit, quam malum id quod metuitur, aut nisi in pari bono et malo multo major sit spes boni quam mali metus, quod prudentiæ arbitrandum relinquitur: sed ita ut semper in dubio ad eam partem quæ alteri magis quam sibi consulit, ut tutiorem, inclinandum sit. *Sinite crescere zizania,* inquit optimus magister, *ne dum ea evellere vultis, evellatis et triticum.* *Multos occidere et indiscretos,* inquit Seneca, *incendii et ruinæ potentia est.* Docent nos historiæ quam seria pœnitentia, Ambrosio monente, talem vindictæ immodestiam Theodosius expiaverit.

Matth. xiii. 28, 29. *Vide* Thom. 2, 2. q. 64. art. 2. Lib. i. *de Clem.* c. 26.

3 Nec si quid Deus interdum facit tale, id nobis in exemplum trahendum est, ob plenissimum illud dominii jus quod ille in nos habet, nobis vero alteri in alterum non concessit, ut

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guilty of the death of another, says Augustine, *who has walled round his own possessions, if any one be injured or killed by the wall falling.*

2 But as we have often warned the reader, that which is agreeable to strict right is not always lawful in all respects: for often goodwill to our neighbour does not permit use to use rigorous rights. Wherefore the events which take place extraneously to our intent, and which we see to be likely, are to be provided against, except the good to which our action tends be much greater than the evil which is apprehended; or except, the good and the evil being equal, the hope of the good is much greater than the fear of the evil; a point which is to be left to the decision of prudence; with the caution that we are always, in a doubtful case, to regard the interest of others rather than our own, as the safer course. *Let the tares grow,* says the best of Teachers, *lest you pull up the wheat with them.* So Seneca says that to cause conflagration and ruin, is to destroy many without distinction. We learn from history, with how grave a remorse Theodosius, on Ambrose's admonition, expiated such an unmeasured course of punishment, [when he had sacked Thessalonica for a sedition, A.C. 390. Gronov.]

3 And if God sometimes does something of this kind, we are not to draw that into an example for us; for he has unlimited dominion over us, but he has not given us such dominion over others, as we

[Lib. II. c. xxi. § 14.] alibi notavimus. Et tamen ille ipse Deus, hominum suo jure dominus, ob paucissimos bonos parcere solet quamvis magnæ malorum universitati, et eo suam, qua judex est, æquitatem testatam facit, ut Abrahami cum Deo colloquium de Sodomis aperte nos docet. Et ex his quidem generalibus regulis cognosci potest quantum in hostem liceat naturaliter.

V. 1 Sed et quæstio incidere solet, quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de ea re acriter certatum scimus, cum alii belli rigorem, alii commerciorum libertatem defenderent.

2 Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantum usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inserviunt: sunt quæ et in bello et extra bellum usum habent, ut pecuniæ, commeatus, [c]naves, et quæ navibus adsunt. In primo genere verum est Procop. i. *Gotth.* c. 3. dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus *De Benef.* vii. 20. querelam non habet. Sic Seneca tyranno gratiam se relaturum ait, [d]si beneficium illi neque vires majores daturum est ad

[c] *Naves et quæ navibus adsunt*] Athenis ἀπόρρητα, id est, evehi vetita, lina, utres, lignum, cera, pix. Scholiastes ad Aristophanis nubes et equites. [In *Equit.* vers. 282. In Scholiis ad *Nubes* nihil hac de re: sed voluit dicere

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have elsewhere explained. And even God himself, who is the supreme Lord of men, often spares the whole body, though large, for the sake of a few good men; and thus manifests his equity as a judge; as the dialogue of God with Abraham concerning Sodom plainly shews.

From these general rules we may see what is lawful against an enemy by Natural Law.

V. 1 But the question often arises, what is lawful against those who are not enemies, or will not allow themselves to be so called, but who provide our enemies with supplies of various kinds. This has been a point sharply contested, both anciently and recently; one party defending the rigorous rights of war, the other, the freedom of commerce.

2 In the first place, we must make a distinction as to the things supplied. For there are some articles of supply which are useful in war only, as arms; others which are of no use in war, but are only luxuries; others which are useful both in war, and out of war, as money, provisions, ships and their furniture. In matters of the first kind, that is true which Amalasuintha said to Justinian, that they are of the party of the enemy who supply him with what is neces-

exitium commune, neque confirmaturum quas habet, id autem est quod reddi illi sine pernicie publica possit: quod explicans addit: *pecuniam quæ satellitem stipendio teneat non subministrabo; si marmora et vestes desiderabit, nihil oberit cuiquam id quo luxuria ejus instruitur; militem et arma non suggeram. Si pro magno petet munere artifices scenæ et quæ feritatem ejus emolliant, libens offeram. Cui triremes et æratas non mitterem, lusorias, et cubiculatas, et alia ludibria regum in mari lascivientium mittam.* Et Ambrosio judice, largiri ei qui conspiret adversus patriam non est probabilis liberalitas. Lib. i. 30. *de Offic.*

3 In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax exspectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati Cap. 6, et 17. *De Judæis.* [Lib. II. c. ii. § 6.]

Ranas, vers. 365. *J. B.*]

[d] *Si beneficium illi, neque vires majores daturum est ad exitium commune*] Vide Parutam libro VII.

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sary in war. The second class of objects is not a matter of complaint. So Seneca says that he would do kindnesses even to a tyrant, if the service so rendered neither gave him greater power for the common mischief, nor confirmed the power which he had, but was only what might be given him without any public evil: *I will not give him money to pay his satellites; but there is no reason why I should not furnish him with marbles and tapestries for his luxury. I will not supply him with soldiers and armour; but if he pressingly asks for stage-players who may soften his disposition, I will willingly give them. I would not send him ships of war, but I will send him ships of pleasure, barges, and other playthings of kings who amuse themselves at sea.* So Ambrose judges, that to give money to him who is conspiring against his country is not a laudable liberality. [This last quotation belongs to the first, not to the second case.]

3 In the third class, objects of ambiguous use, the state of the war is to be considered. For if I cannot defend myself except by intercepting what is sent, necessity, as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this; as if I were

modum res quoque ejus capi, et dominium earum debiti consequendi causa quæri poterit. Si damnum nondum dederit, sed Silv. *in Verb. Restit.* p. 3. § 12. dare voluerit, jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus, aut alio modo. Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantum civiliter

[e] *Publicæ significationes fieri*] Vide exempla in bello communi contra Ægyptios, Saracenos, aliosque, c. ult. *de Transactionibus*, c. significavit, II. *de Judæis*. Extravagante *de Judæis*, c. copiosus, I. Liber *Consulatus maris* editus est lingua Italica, in quem relatæ sunt constitutiones Imperatorum Græciæ, Alemaniæ, regum Francorum, Hispaniæ, Syriæ, Cypri, Balearium, Venetorum, Genuensium, cujus libri titulo CCLXXIV. tractantur hujus generis controversiæ: ac sic definitur, si et navis et merces hostium sint, rem esse in aperto, fieri ea capientium: si vero navis sit pacem colentium, merces autem hostium, cogi posse ab his qui bellum gerant, navem, ut merces eas in aliquem portum deferat, qui sit suarum partium, ita tamen ut vecturæ pretium nautæ solvatur. Si contra navis hostilis fuerit, merces vero aliorum, de nave transigendum: aut, si nolint vectores transigere, cogendos ut cum navi eant in portum aliquem partium capientis, et ut capienti solvant pretium quod pro navis usu debebatur. Apud Hollandos anno cIↃ CCCC XXXVIII. cum bellum ipsis esset cum Lubeca aliisque civitatibus ad mare Balticum et Albim sitis, frequente senatu judicatum est, etiam in hostium navibus repertas merces, quas aliorum esse constaret, in prædam non cedere; idque ibi pro lege deinceps habitum est. Sic et Daniæ rex sensit, cum anno cIↃ IↃ XCVII. ad Hollandos eorumque federatos legationem mitteret, qua libertatem navigandi mercesque ferendi in Hispaniam, cum qua Hollandi bellum gerebant acerrimum, suis vindicabat. Apud Gallos libertas mercaturam exercendi pacatis populis, etiam apud eos qui Galliæ hostes essent, semper permissa; et quidem adeo indiscrete, ut hostes sæpe sub alienis nominibus res suas occultarent; ut apparet ex edicto anno cIↃ IↃ XLIII. capite XLII. quod tralatum est in edictum anni cIↃ IↃ LXXXIV. et sequentia. Iis edictis diserte cavetur, ut Gallorum amicis liceat belli tempore exercere mercaturam, dummodo suis navibus, suosque per homines, navesque ac merces, quocumque visum ipsis esset perducere, dum ne merces eæ sint belli instrumenta, quibus res hostium fovere velint: quod si fiat permittitur Gallis talia belli instrumenta sibi sumere, persoluto æquo pretio. Hic duo notanda, his legibus nec belli instrumenta in prædam cessisse, multo magis ab eo periculo abfuisse merces innoxias. Non negem aliud jus usurpasse interdum septentrionis gentes, sed varie, ex usu magis temporum quam ex æquitate perpetua. Nam cum Angli bellorum suorum obtentu Danorum commercia impedissent, na-

besieging a town, or blockading a port, and if surrender or peace were expected; he will be bound to me for damages; as a person would who liberates my debtor from prison, or assists his flight to my injury; and to the extent of the damage, his property may be taken, and ownership thereof be assumed for the sake of recovering my debt. If he have not yet caused damage, but have tried to cause it, I shall have a right, by the retention of his property, to compel him to give security for the future, by hostages, pledges, or in some other way. But if, besides, the injustice of my enemy to me be very evident, and he con-

tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de pœnis diximus; quare intra eum modum etiam spoliari poterit.

4 Et has ob causas solent a bellum gerentibus [e] publicæ

tum inde jam olim bellum inter eas gentes eo exitu ut Dani Anglis tributum imponerent, cui, Danico denario nomen, cui, mutata quamvis causa, nomen mansit adusque tempora Guilielmi ejus qui stirpem nunc regnantem in Anglia fundavit, ut notavit vir magnæ fidei Thuanus in historia anni cIↃ IↃ LXXXIX. Rursum ab Elizabetha, sapientissima Angliæ regina, missi anno cIↃ IↃ LXXV. ad Batavos Wilhelmus Winterus ex ordine equestri et Robertus Bealus regio consilio ab epistolis, qui ostenderent ferre Anglos non posse, quod Batavi, in ipso æstu belli in Hispanos, naves Anglorum ad Hispanicos portus vectas detentassent. Narrat Reidanus in *Historia Batavica* (pag. 17. *Vers. Latin. D. Voss.*) anno cIↃ IↃ LXXV. et Britannus Camdenus anno sequente: (pag. 273 *Ed. Elzevir.*) Cum vero Angli, et ipsi Hispanis hostes facti, Germaniæ civitatibus jus in Hispaniam navigandi turbarent, quam id non certo jure fecerint, apparet ex scriptis adversariis gentis utriusque, dignis lectu ad noscendam hanc controversiam. Et notandum, Anglos in suis scriptis ipsos id agnoscere, cum duo maxime pro sua afferunt causa, et belli instrumenta fuisse quæ a Germanis in Hispaniam deferebantur, et pactiones veteres intercedere quo minus id fieri liceret: quales postea pactiones et Hollandi sociique eorum cum Lubecensibus sociisque eorum fecere anno cIↃ IↃC XIII. ne aut hi aut illi hostium subditos intra suos fines mercari permitterent, aut hostes pecunia, milite, navibus, victu juvarent: et posterius, anno scilicet cIↃ IↃC XXVII. inter Suediæ Daniæque reges convenit ut Danus impediret omnem mercatum cum Dantiscanis Suedi hostibus, sed nec ad alios Suedi hostes merces ullas per fretum Cimbricum ire sineret, pro quo rex Daniæ alia sibi vicissim commoda stipulatus est: sed hæc sunt pacta specialia ex quibus nihil inferri potest quod omnes obliget. Nam et illud in scriptis suis dixere Germani, non omnes pactis merces prohiberi, sed eas quæ in Angliam semel importatæ aut in Angliæ comparatæ essent. Neque vero soli Germani Anglis cum hoste suo commercia vetantibus contradixere. Etiam Polonia misso legato conquesta est jus gentium imminui, quando ob Anglicum cum Hispania bellum ipsis cum Hispanis commercia agitandi libertas adimeretur, ut in anno cIↃ IↃ XCVII. narrant memorati jam nobis Camdenus et Reidanus. (Cambden. pag. 692, *et seqq.* Reid. pag. 372, *et seqq.*) Galli vero post pacem Verbinianam cum Hispano factam, Elizabetha Angliæ regina in bello perstante, rogati ab Anglis ut naves Gallicas in Hispaniam

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firm him in a most unjust war, he will then be bound to me not only civilly, for the damage, but also criminally, as being one who protects a manifest criminal from the judge who is about to inflict punishment: and on that ground it will be lawful to take such measures against him as are suitable to the offense, according to the principles laid down in speaking of punishment; and therefore to that extent he may be subjected to spoliation.

4 On this account, belligerents[e] commonly issue manifestos to other

[e] There are examples of rules on this subject in the Roman Law. [See the quotations.] In modern times, the book *Consolato del Mare* was published in

significationes fieri ad alios populos, tum ut de jure causæ, tum etiam ut de spe probabili juris exequendi appareat.

euntes excutere liceret, nequis forte bellicus paratus occultaretur, concedere ne hoc quidem voluere, dicentes obtentum rapinis et commerciis turbandis quæri. Et eo federe quod Angli cum Hollandis eorumque sociis anno cIↃIↃC xxv. pepigere, id quidem convenit, ut rogarentur ceteræ gentes, quarum intererat magnitudinem Hispanicam infringi, ut et ipsæ vetarent cum Hispanis commercia, sed, si ultro id non facerent, placuit inspici naves num quid bellici instrumenti ferrent, sed ultra neque naves neque merces retentari, aut quicquam pacatis noceri eo nomine. Atque evenit eodem anno ut Hamburgenses quidam in Hispaniam irent nave maxima ex parte onusta apparatu bellico, qui ipse quidem apparatus ab Anglis vindicatus est, sed ceterarum mercium persolutum est pretium. Galli autem, cum ab Anglis naves Gallicæ in Hispaniam euntes in fiscum raperentur, ostenderunt pati se id nolle. Bene ergo dictum a nobis, significationes publicas requiri, quod et Angli ipsi ita sensere; a quibus factæ significationis talis exemplum est apud Camdenum circa annum cIↃIↃxci et cIↃIↃxcviii. Neque vero talibus significationibus semper paritum, sed distincta tempora, causæ, loca. Anno enim cIↃccccLviii Lubecensis civitas significationi a Dantiscanis sibi factæ, ne cum Malmogensibus

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nations, to make known both the justice of the cause, and also the probable hope of exacting their rights.

[The note of Grotius respecting the cases in which the rights of belligerents against neutrals had then been enforced is so important, that I will give the substance of it below. I may observe that the rules which he has here laid down agree with the Rules of International

Italian, and contains the constitutions of the Emperors of Greece and Germany, the kings of the Franks, of Spain, Cyprus, the Balearic Isles, of the Venetians, and of the Genoese. In Title 274 of this book, controversies of this kind are treated; and the rule given is this, that if the ships and the lading both belong to the enemy, the matter is plain, and they become the property of the captors. If the ship belong to a neutral, the goods to an enemy, the belligerent may compel the ship to go into a port of his own, paying the navigators for the freight. If, on the other hand, it is an enemy's ship, with the goods of a neutral, the ship is to be ransomed, and if the navigators refuse this, they may be taken into a port of the captors, and the captor must be paid for the use of the ship.

In the year 1438, when the Hollanders were at war with Lubeck and other cities on the Baltic and the Elbe, they decided in full Senate, that goods of neutrals found in the enemy's ships were not good prize, and that law was afterwards maintained. So also in 1597, the king of Denmark judged, when he sent an embassy to the Hollanders, and their allies, asserting for his subjects the right of carrying goods into Spain, with which the Hollanders were then in fierce war. The French always permitted neutrals the right of carrying on commerce with those who were the enemies of France; and so indiscreetly, that their enemies often covered their goods with neutral names; as appears by an edict of 1543, chap. 42, which was copied again in an edict of 1584, and the following year. In those edicts, it is plainly declared that the friends of the French shall be allowed to carry on commerce during war, provided that they do it with their own ships and their own men; and that they may land where they please, provided the goods are not munitions of war; but if these are carried, it is declared to be lawful for the French to

5 Hanc autem quæstionem ad jus naturæ ideo retulimus, quia ex historiis [f]nihil comperire potuimus ea de re jure vo-

et Memelensibus Dantisci hostibus mercaturam exerceret, parendum non censuit. Neque magis paruere Hollandi anno cIↃ IↃLI. cum Lubecenses ipsis denuntiarent, ut a Danorum, quos ipsi hostes tum habebant, commercio abstineretur. Anno vero cIↃ IↃXXII. quo tempore inter Suedos Danosque bellabatur, cum Danus Ansiaticas civitates rogasset ne cum Suedis commercia haberent, quædam civitates amicitia ipsius indigentes morem gessere, aliæ non item. Hollandi, bello ardente inter Suediam et Poloniæ regem, nunquam passi sunt sibi aut hujus aut illius gentis commercio interdici. Gallis autem semper reddidere naves quas ab Hispania revertentes, aut in Hispaniam, ipsis tunc hostilem, euntes Hollandicæ naves interceperant. Vide Ludovici Servini advocati quondam regii orationem habitam anno cIↃ IↃXCII. in causa Hamburgensium. Verum iidem Batavi Dunquercam, ad quam classem habebant, ab Anglis merces inferri non siverunt: quomodo Dantiscani anno cIↃ CCCCLV. Batavis denuntiarunt, nequid in urbem Regiomontanam inferrent, narrante Gaspare Schutzio in *Historia Prussica.* Adde Cabetum decisione XLIII. num. 2. et Seraphinum de Freitas in libro *de Justo Imperio Lusitanorum Asiatico*, ubi complures adducit alios.

[f] *Nihil comperire potuimus ea de re*

Law, as laid down by modern authors: namely (see *E. M.* 1087, 1088), That Neutrals have no right of carrying *Munitions of War*, (Grotius's first class of supplies, called *Contraband of War*,) to one of the belligerents; and that they have no right of carrying anything to a place in a *state of Blockade.*]

5 We have referred this question to Natural Law because we have

take such goods, paying a fair price for them. Here we note two points, that even munitions of war were not declared prize; still less goods of a peaceful character.

I do not deny that the northern nations asserted other rules, but variously, and rather for an occasional purpose than as a permanent rule of equity. For when the English, under pretence of their wars, had interfered with the Danish commerce, a war arose between those two nations, of which the event was that the Danes imposed a tribute on England, which, under the name of the *Danes' penny*, remained, though the alleged reason was changed, to the time of William the Conqueror, the founder of the present dynasty in England, as Thuanus notes in the history of 1589. Again, Elizabeth, the sagacious queen of England, sent in 1575, Sir William Winter, and Robert Beal, secretary of state, to Holland to complain that the English could not allow the Dutch, in the heat of the war, to detain, as they had done, English ships bound to Spanish ports. So Reidan relates in his Batavian history, at the year 1575, and Camden, at the following year. But when the English had themselves gone to war with the Spanish, and interfered with the right of the German cities to sail to Spain, how doubtful the right was by which they did this, appears from the adverse arguments of both nations, which deserve to be read for the purpose of understanding this controversy. And it may be noted that the English themselves acknowledge this; since the two main arguments which they allege are, that what the Germans carried into Spain were munitions of war, and that there were old conventions which prohibited such an act. And conventions of this kind were made by the Hollanders and their allies, with the Lubeckers and their allies in the year 1613; to the effect that neither party should

Polyb. i. 83. luntario gentium esse constitutum. Romanos qui Carthaginiensium hostibus commeatus attulerant, ipsi Carthaginienses aliquando ceperunt: eosdem iidem Carthaginienses repetenti-
Plut. *Demet.* p. 904 E. bus Romanis reddiderunt. Demetrius cum Atticam teneret exercitu, jamque vicina oppida Eleusina et Rhamnuntem cepisset, Athenis famem facturus, navis frumentum inferre parantis

jure voluntario gentium esse constitutum] Multa hujus quæstionis habet vir doctissimus Johannes Meursius in *Historia Danica*, libro I. et II. Ubi videbis Lubecenses et Imperatorem esse pro commerciis, contra ea Danos. Vide et Crantzium *Vandalicorum* libro XIV. (cap. 29.) Thuanum in dicto anno cIↃ IↃ LXXXIX. libro historiarum XCVI. Camdenum, præter jam dicta loca, in anno cIↃ IↃ LXXXIX. et cIↃ IↃ XCV. Ubi illa inter Anglos et Germanos, quos Ansiaticos vocant, controversia tractatur.

g *Et magistrum et gubernatorem*

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not been able to find in history[f] anything on the subject as determined by Instituted Law. When the Romans carried provisions to the enemies of the Carthaginians, they were sometimes taken prisoners by the Carthaginians, and then given up by the Carthaginians to the Romans on being demanded. When Demetrius held Attica with an army, and had taken Eleusis and Rhamnus, neighbouring towns, in-

permit the subjects of an enemy to traffic in their country, nor should assist the enemy with soldiers, ships or provisions. And afterwards, in 1627, a convention was made between the kings of Sweden and of Denmark, to the effect that the Danes should prevent all commerce with the Dantzickers, the enemies of the Swedes; and should not allow any merchandize to pass the Sound, to the other enemies of the Swedes; for which terms the king of Denmark stipulated in turn certain advantages to himself.

But these were special conventions, from which nothing can be inferred which is binding upon all. For what the Germans said in their declarations was, not that all merchandize was prohibited by this convention, but that only which was once carried to England or made in England. Nor were the Germans the only party who refused to acknowledge the doctrines of the English, forbidding commerce with their enemy. For Poland complained by her ambassador that the Laws of Nations were infringed, when, on account of the English war with Spain, they were deprived of the power of trafficking with the Spanish; as Camden and Reidan mention under the year 1597. And the French, after the peace of Vervins with Spain, when Elizabeth of England persisted in the war, being requested by the English to allow their ships going to Spain to be visited, that they might not privily carry munitions of war, would not permit this; saying that the request, if granted, would be made a pretext for spoliation and disturbance of commerce.

And in the league which the English made with the Hollanders and their allies in the year 1625, a convention was indeed made, that other nations, whose interest it was that the power of Spain should be broken, should be requested to forbid commerce with Spain; but if they would not agree to this, that their ships should be searched, to see whether they carried munitions of war; but that beyond this, neither the ships nor the cargo should be detained, nor that any damage should be done to neutrals on that ground. And in the same year it happened, that certain Hamburghers went to Spain in a ship laden for the most part with munitions of war; and this part of the lading was claimed by the English; but the rest of the

[g] et magistrum et gubernatorem suspendit, atque eo modo deterritis ceteris potitus urbe est.

VI. 1 Modum agendi quod attinet, vis ac terror maxime propria bellorum. An et dolis uti liceat quæri solet. Nam Homerus quidem dixit hosti nocendum:

[2] Ἢ δόλῳ, ἠὲ βίῃ, ἢ ἀμφαδὸν, ἠὲ κρυφηδόν.

Sive dolo, seu vi manifesta, clamve, palamve.

suspendit] Non multum dissimile est quod de Pompeio narrat Plutarchus in *Mithridatici Belli Historia*: ἐπέστηκε φύλακας τῶν νεῶν ἐπὶ τοὺς πλέοντας εἰς Βόσφορον ἐμπόρους. καὶ θάνατος ἦν ἡ ζημία τοῖς ἁλισκομένοις· *custodes imposuit Bosphoro, qui observarent si qui mercatorum in Bosphorum navigarent: deprehensis pœna mors.* (Pag. 639 E.)

[2] Non est versus Homericus, sed pars ejus legitur *Odyss.* IX. 119. et Lib.

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tending to reduce Athens by famine, and when a ship attempted to introduce corn into the city, he hung the captain and the pilot of the ship, and thus, deterring others, became master of the city.

VI. 1 As to the mode of acting in war, force and terror are the appropriate means. Whether it is allowable to use stratagem also, is a

lading was paid for. But the French, when French ships going to Spain were confiscated by the English, shewed that they would not tolerate this. Therefore we have rightly said that public declarations are required. And this the English themselves saw the necessity of. For they made such public declaration in 1591 and 1598, as we see in Camden.

Nor have such declarations always been obeyed, but times, causes, and places have been made grounds of distinctions. In 1458 the city of Lubeck refused to obey a notice given to them by the Dantzickers, that they were not to trade with the people of Malmoge and Memel. Nor did the Hollanders in 1551 obey, when the Lubeckers gave them notice to abstain from traffic with the Danes with whom they were then at war. In the year 1522, when there was a war between Sweden and Denmark, when the Danes had asked the Hanseatic cities not to have commerce with the Swedes, some of the cities who had need of their friendship conformed to this, but others did not. The Hollanders, when war was raging between Sweden and Poland, never allowed their commerce with either nation to be interdicted. The French always restored the Dutch ships which they took either going to or coming from Spain, then at war with them. See the pleading of Louis Servinus, held in 1592, in the case of the Hamburghers. But the same Dutch did not allow the English to carry merchandize into Dunkirk, before which they had a fleet; as the Dantzickers in 1455 did not allow the Dutch to carry anything into Königsberg. [See the authorities.

See also the subsequent views entertained on this subject, *E. M.* 1085—1091, and the authorities there quoted.]

[Grotius's note.] [f] There is much on this subject in Meursius's *Danish History*, B. I. and II. There you will see that the Lubeckers and the Emperor are for commerce, the Danes against it. Also see Crantzius, Thuanus, as quoted, Camden, besides the passages already quoted, on the years 1589 and 1595; where that controversy between the English and those Germans whom they call the Hanse towns is treated of.

Et Pindari est (*Isthmiac.* iv. 82):

> Χρὴ δὲ πᾶν ἔρ-
> δοντ᾽ ἀμαυρῶσαι τὸν ἐχθρόν.
> Quidvis agendo scilicet hostica
> Delenda vis est.

Apud Virgilium [*Æneid.* ii. v. 300] quoque dictum illud,

> Dolus an virtus quis in hoste requirat?

sequitur ipse

> Ripheus, justissimus unus
> Qui fuit in Teucris et servantissimus æqui.

Et legitur hoc ipsum imitatus sapientiæ nomine nobilissimus Solon. Silius in rebus Fabii Maximi:

Plutarch. *in Sol.* p. 82.
Lib. xv. v. 327.

> Exin virtuti placuit dolus.

2 Apud Homerum Ulysses viri sapientis exemplum, plenus ubique fraudium in hostem: unde Lucianus regulam elicit, laude dignos qui hostem fallunt. Nihil utilius in bello dolis Xenophon dixit, et Brasidas apud Thucydidem præclaram imprimis laudem esse ex [h]belli furtis: et apud Plutarchum Agesilaus hostes decipere et justum et licitum esse. Polybius, quæ vi fiunt in bello minoris censenda, quam quæ ex occasione et dolo: et ex eo Silius Corvinum sic inducit loquentem:

Luc. *Philopseud.* pp. 326, 327.
Cyri inst. i. 6. *et de re equest.* c. 5. n. 9.
Lib. v. c. 9.
Plut. *Apoph.* p. 209.
Polyb. ix. 2.
Lib. v. v. 100.

> [i]Bellandum est astu: levior laus in duce dextra.

Atque ita censuisse ipsos illos severos Laconas notat Plutarchus, ac majorem etiam victimam ab eo immolatam, qui dolo,

Vit. Marcell. p. 311 B.

I. vers. 295, 296. Habet Auctor e Stobæo, Serm. LII. pag. 365. ubi Antigono tribuitur. *J. B.*

h *Belli furtis*] Ita et Virgilius loquitur *Æneidos* XI. (vers. 515) et Sallustius, quem citat Servius. [Vide Nonium Marcellum, voce Furtum, pag. 310. *Ed. Mercer.*]

i *Bellandum est astu*] Muhammedis dictum simile: *elharbu Hudiatum, id*

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common question. It is assumed that it is, by Homer, Pindar, Virgil, Solon, Silius. [See the passages quoted.]

2 Ulysses in Homer, the example of a wise man, is full of stratagems towards the enemy; and Lucian praises those who deceive the enemy. Xenophon said that in war nothing was so useful as deceit; so in Thucydides, Brasidas; and in Plutarch, Agesilaus. Polybius and Silius say that in war fraud is better than force; so the severe Lacedæmonians thought, as Plutarch says: and so he praises Lysander and Philopemen. So Ammianus.

3 The Roman Jurists call it good deceit (*bonus dolus*) which a man practises against an enemy, and say that it makes no difference whether any one elude the enemy by force or by fraud. So Eustathius.

quam qui aperto Marte rem confecisset. Idem [k]Lysandrum magni facit ἀπάταις τὰ πολλὰ διαποικίλλοντα τοῦ πολέμου, *pleraque belli dolis variantem.* Et in Philopœmenis laudibus ponit, quod Cretensium disciplina institutus simplicem illum ac generosum bellandi morem dolis ac furtis miscuisset. Ammiani est: *nullo discrimine virtutis ac doli, prosperos omnes laudari debere bellorum eventus.*

Vit. Lys. p. 437 A.

Pag. 363 E.

Lib. xvii. 5.

3 Jurisconsulti Romani bonum dolum vocant, si adversus hostem quis machinaretur: et alibi, nihil interesse vi quis an fallacia potestatem hostium evaserit: δόλος οὐ ψεκτὸς, οἷα στρατιωτικὸς notat ad Iliados ο′ Eustathius. Inter Theologos Augustinus: *cum justum bellum suscipitur, vi aperta pugnet quis aut ex insidiis, nihil ad justitiam interest.* Et Chrysostomus, maxime laudari imperatores qui fraude victoriam quæsiissent.

L. 1. § 3. *D. de dolo malo.*

L. nihil. 26. *D. de captiv.*

Quæst. x. *sup. Josue.*

caus. xxiii. q. 11. c. 2.

Lib. i. *De Sacerd.* Tom. VI. p. 6.

4 Sed nec desunt sententiæ quæ suadere videntur partem contrariam, quarum nonnullas infra adferemus. Quæstionis hujus definitio pendet ex eo, an dolus in genere sit semper malorum, in quibus locum habet non esse faciendum malum ut eveniat bonum, an ex iis quæ vitium non habent universaliter ex suapte natura, sed quibus accidere etiam potest ut bona sint.

VII. Notandum igitur, dolum alium consistere in actu negativo, alium in actu positivo. Doli vocem etiam ad ea quæ in negativo actu consistunt extendo, Labeone auctore,

L. 1. § *dolum malum. D. de dolo malo.*

est, pugnæ fraudem requirunt. Apud Virgilium in comitatu Martis (*Æn.* XII. 336):

Iræque insidiæque.

Ubi Servius: *non tantum virtute, sed insidiis comitatum se ostendit.*

[k] *Lysandrum*] Ei Sullam comparat Plutarchus, in cujus animo leonem esse et vulpem dicebat Carbo, (pag. 469 F.)

Among the Theologians, Augustine says the same; and Chrysostom, that the generals who had conquered by deceit were most praised.

4 But there are not wanting opinions which bear the other way, of which we will adduce some. The determination of this question depends on this, whether deceit in its kind be always a bad thing: if so, we are not to do evil that good may come: or whether it be a thing of that kind which is not universally bad by its nature, but which may happen to be good.

VII. It is to be noted, therefore, that deceit may be of two kinds, as it consists in a negative or in a positive act. I extend the term *deceit* to acts of a negative kind, on the authority of Labeo, who refers the act to deceit not evil, when any one by dissimulation

qui ad dolum sed non malum refert, ubi quis per dissimulationem tuetur sua vel aliena. Haud dubie crude nimis a Cicerone dictum [3]est: *ex omni vita simulationem dissimulationemque tollendam.* Nam cum nec quæ scias, nec quæ velis omnia aperire aliis tenearis, sequitur ut dissimulare quædam apud quosdam, id est tegere et occultare, fas sit. *Licet,* inquit [l]Augustinus, *veritatem occultare prudenter, sub aliqua dissimulatione.* Et [m]necessariam hanc omnino atque inevitabilem, his præsertim quibus respublica commissa est, non uno loco fatetur ipse Cicero. Exemplum ad hanc rem insigne præbet Jeremiæ historia capite XXXVIII. Is enim propheta a rege interrogatus de obsidionis eventu, apud proceres, regis postulatu, hoc ipsum prudenter occultat, aliam interim causam, nec falsam tamen, colloquii adferens. Et huc quoque referri potest quod [n]Abrahamus Saram sororem, id est, ex usitato tum loquendi more, propinquam consanguineam vocat, matrimonium dissimulans.

De Offic. iii. 15.

Lib. contr. mend. c. 10. Thom. 2, 2. q. 40. art. 3. *in resp. et* q. 71. art. 3. Silv. *in Verbo Bell.* p. 1. n. 9. *Or. pro Mil.* c. 24. et l. x. ep. 8. et *pro Cn. Plancio,* c. 6.

Gen. xx. Thom. 2, 2. q. 110. art. 3. *in resp.*

VIII. 1 Dolus qui in actu positivo consistit, si in rebus,

[3] Vide, quæ diximus ad PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. IV. cap. i. § 9. not. 5. alterius Editionis. Auctor ipse postea § 9 Ciceronem inter eos ponit, qui non omne falsiloquium malum esse putarunt. *J. B.*

[l] *Augustinus*] Et in v. Psalmum versiculo: *perdes omnes. Aliud est mentiri, aliud est verum occultare.* Citatur causa XXII. quæstione ii. cap. 14.

[m] *Necessariam hanc omnino atque inevitabilem*] Vide Chrysostomum primo *de Sacerdotio.* (§ 63. *et seqq. Ed. Bengel.*)

[n] *Abrahamus*] *Veritatem voluit celari, non mendacium dici.* Augustinus

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defends his own or another's goods. Undoubtedly Cicero spoke too generally, when he said that simulation and dissimulation are to be entirely removed from our scheme of life. For since we are not bound to disclose to others all that we know or all that we wish, it follows that we may dissemble, that is, conceal and keep secret, some things from some persons. As Augustine says, *It is lawful to conceal in prudence the truth under a certain dissimulation.* And Cicero himself repeatedly acknowledges that this is necessary and inevitable, especially for those who have to administer public affairs. We have an example of this, Jeremiah, chap. xxxviii. 24, 25; where the prophet, having been consulted by the king as to the event of the siege of the city, gave to the princes another reason for the conference. And of the same kind was Abraham's dissembling that Sarah was his wife.

VIII. 1 Deceit which consists in a positive act, if it be perpetrated by things, is called *simulation,* if by words, a *lie.* Some lay down this distinction between these two, that they say that words are naturally the signs of notions, but that things are not so. But the

simulatio, si in sermone, mendacium vocatur. Quidam inter hæc duo hanc constituunt differentiam, quod dicant voces naturaliter signa esse intellectuum, res non item. Sed contra verum est, voces natura ipsa et citra hominum voluntatem nihil significare, nisi forte vox sit confusa et ἄναρθρος, qualis in dolore, quæ ipsa rei magis appellatione venit quam locutionis. Quod si hoc dicatur, hominis naturam hanc esse peculiarem supra animantes ceteras, ut conceptus animi possit aliis indicare, et ad eam rem voces repertas, verum quidem dicitur: sed addendum est, non solis vocibus tale fieri indicium, [o]sed et nutibus, ut apud mutos, sive illi nutus aliquid habent cum re significata commune ipsa natura, sive tantum ex instituto significant: quibus nutibus pares sunt notæ illæ quæ non voces lingua figuratas significant, ut [p]Paulus jurisconsultus loquitur, sed res ipsas, sive ex aliqua convenientia, ut notæ hieroglyphicæ, sive mero arbitratu, ut apud Sinenses.

L. Labeo 7. § f. D. de sup. leg.

L. Non fig. 38. D. de obl. et act.

2 Alia igitur hic adhibenda distinctio est, qualem adhibuimus ad tollendam ambiguitatem in voce juris gentium.

quæstione XXVII. in Genesin, relatus a Gratiano dicta causa XXII. quæstione ii. cap. 22.

o *Sed et nutibus*] Plinius de Æthiopum gente libro VI. 30. *Quibusdam pro sermone nutus motusque membrorum est.* Vide c. tuæ fraternitati, 25. *de Sponsalibus.*

p *Paulus jurisconsultus loquitur*] *Non figura*, inquit, *literarum, sed oratione quam exprimunt literæ obligamur, quatenus placuit non minus valere quod scriptura quam quod vocibus lingua figuratis significaretur.* Valde philosophice dixit *placuit*, ut ostenderet hæc valere ἐκ συνθήκης.

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contrary is true, that words, by nature, and extraneously to the will of man, have no signification; except inarticulate sounds, as of grief; which, however, may rather be called actions than words. But if it be said that this is the peculiar nature of man, that he can convey the conceptions of his mind to other men, and that words were invented for that purpose; this is truly said; but then it ought to be added, that such indications are not made by words alone, but also by nods, as among dumb persons, whether those nods have by their nature anything in common with the thing signified, or have their signification by institution. And of the same nature with these nods, are those written characters which do not express words as they are pronounced, but things; whether in virtue of some agreement between the character and the thing, as in hieroglyphics, or by arbitrary appointment, as among the Chinese.

2 We must, therefore, have recourse to another distinction, of the kind of that which we adopted to get rid of the ambiguity in speaking of *jus gentium*. For we said that the term was applied both to that

Diximus enim jus gentium dici, et quod singulis gentibus placuit sine mutua obligatione, et id quod mutuam obligationem in se continet. [4]Voces ergo, et nutus, et notæ quas diximus, reperta sunt ad significandum cum mutua obligatione, quod
De interp. c. 4. Aristoteles dixit κατὰ συνθήκην: res aliæ non item. Hinc fit [q]ut rebus aliis uti liceat, etiamsi prævideamus futurum ut alter inde falsam concipiat opinionem. Loquor de eo quod intrinsecum est, non de eo quod accidit. Itaque exemplum ponendum est, [r]ubi nullum sequitur inde nocumentum, aut ubi nocumentum ipsum, seposita doli consideratione, licitum est.

Luc. xxiv. 28. 3 Prioris exemplum est in Christo, qui apud comites Emauntinos προσεποιεῖτο ire longius, id est, speciem prætulit ituri longius, nisi malimus vere quoque voluisse eum ire longius, sub conditione tamen nisi magno nisu retineretur, quomodo et Deus multa velle dicitur quæ non fiunt: et alibi
Marc. vi. 48. Christus ipse dicitur voluisse præterire apostolos navigantes, nempe nisi impense rogaretur navem ascendere. Alterum

[4] Heic, ut in toto argumento isto, conferendus perpetuo PUFENDORFIUS, *De Jure Nat. et Gent.* Lib. IV. cap. 1, cum Notis nostris, ubi res adcuratius pertractatur, in altera præsertim Editione. *J. B.*

[q] *Ut rebus aliis uti liceat, etiamsi prævideamus futurum ut alter inde falsam concipiat opinionem*] Vide Augustinum *de Doctrina Christiana* Lib. II. cap. 34.

[r] *Ubi nullum inde sequitur nocumentum*] Ut in facto Micholis, I. Sam. xix. 16.

[s] Οἰκονομίαν] Sic hanc vocandam, non ἀπάτην id est fraudem, ait Chry-

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which had been established by separate nations without mutual connexion, and to that which contains a common mutual obligation. Words then, and nods, and the written characters which we have mentioned, have been invented to signify a meaning with mutual obligation, or by convention; but other things, not so. Hence we may use other things although we foresee that another person will therefrom form a false opinion. I speak of what is intrinsic, not of what may happen. Therefore we must take an example where no damage follows; or where the damage, setting aside the consideration of deceit, is lawful.

3 Of the former kind we have an example in Christ, who, having accompanied the disciples to Emmaus, *made as if he would go further:* he pretended to intend to do so: except we prefer to say that he did intend to go further except he were detained by urgency: as God is said to intend many things which do not come to pass. And in another place Christ, it is said, (Mark vi. 48) *would have passed by* the disciples: that is, if he had not been urgently entreated to come into the ship. We may give another example in Paul,

exemplum dari potest in Paulo qui Timotheum circumcidit, *Act.* xvi. 3. cum satis sciret Judæos hoc ita accepturos, quasi circumcisionis præceptum, quod revera abolitum jam erat, adhuc obligaret Israëlis posteros, quasique ita sentirent ipsi Paulus et Timotheus: cum tamen hoc non quæreret Paulus, sed tantum familiarius cum Judæis versandi facultatem sibi et Timotheo præbere. Neque vero circumcisio, sublata lege divina, ex instituto amplius significabat talem necessitatem, neque malum quod inde sequebatur erroris ad tempus, dedocendi postea, tanti erat, quanti illud bonum quo Paulus tendebat: nimirum evangelicæ veritatis insinuatio. Hanc simulationem patres Græci sæpe vocant [s] *Οἰκονομίαν*: de qua egregia exstat sententia Clementis Alexandrini, qui de viro bono agens sic ait: *Strom.* vii. 9. p. 863. *ἐπὶ τῶν πλησίων ὠφελείᾳ μόνῃ ποιήσει τινὰ ἃ οὐκ ἂν προηγουμένως αὐτῷ πραχθείη*: *ob utilitatem proximi faciet quædam, quæ sponte alioquin ac primaria intentione non faceret.* Tale in bello Romanorum illud, qui de capitolio panem in Liv. v. 48. hostium stationes jecerunt, ne fame premi crederentur.

sostomus indicato jam libro primo *de Sacerdotio.* (Tom. VI. pag. 7.) Idem I. ad Corinthios iv. 6. *ἦν δὲ ταῦτα οὐχ ὑπόκρισις, ἀλλὰ συγκατάβασις καὶ οἰκονομία· non hic fraus fuit, sed obsequentia quædam et dispensatio.* (Tom. III. p. 313.) Et ix. 20. *ἵνα γὰρ τοὺς ὄντας ἀληθῶς εἰς ταῦτα μεταστήσῃ, ἐγένετο αὐτὸς οὐκ ἀληθῶς, ἐπιδεικνύμενος μόνον, οὐκ ὢν δὲ, οὐδὲ ἐκ διανοίας ταῦτα πράττων οὕτως ἐχούσης· ut enim qui tales revera erant corrigeret, factus ille talis, non revera aliud quam quod erat præ se ferens, agens talia, sed non ex tali animi proposito.* (Pag. 383.) Huc referri potest simulatus Davidis furor.

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who circumcised Timothy, knowing that the Jews would take this as if the command of circumcision, though the necessity thereof was really abolished, still bound the Israelites, and as if Paul and Timothy so thought: while Paul's purpose was not this, but only to obtain for himself and Timothy the means of living on familiar terms with the Jews. The act of circumcision, when the divine law was taken away, no longer implied by institution such a necessity; and the evil which thence followed, of error for a time, which error was afterwards to be rectified, was not of so great moment, as the good to which St Paul tended; that is, the communication of evangelical truth. This simulation the Greek fathers often call *Economy;* and so Clemens Alexandrinus says, that *a good man will do for the advantage of his neighbours some things which he would not do of his own motion.* Such an act was that of the Romans in war, who threw loaves from the capitol into the stations of the enemy, that they might not appear to be distressed by famine.

Jos. viii. Silv. *in Verb. Bell* p. 1. n. 8.

4 Exemplum posterioris est in ficta fuga, qualem Josue suis præcepit ad Haium expugnandum, et alii duces sæpe. Nam hic quod sequitur nocumentum licitum esse ponimus ex belli justitia; ipsa autem fuga ex instituto nihil significat, quanquam hostis eam accipit ut signum pavoris, quod alter cavere non tenetur, utens sua libertate huc vel illuc eundi, et magis minusve celeriter, et hoc vel illo gestu habituve. Eodem referri debet eorum actus qui hostium armis, signis, vestibus, velis usi passim leguntur.

5 Hæc enim omnia ejus sunt generis ut a quovis pro arbitrio etiam contra consuetudinem usurpari possint, quia consuetudo ipsa singulorum arbitrio, non quasi consensu communi, introducta est, qualis consuetudo neminem obligat.

IX. 1 Gravior est disputatio de illis notis, quæ, ut ita dicam, in commercio hominum versantur, in quo genere proprie mendacium situm est. Multa enim sunt contra mendacium in sacris literis. *Verbum mendax odio habebit justus,* id est, *vir bonus.* Proverb. xiii. 5. *Falsiloquentiam et verbum mendax amove a me.* Proverb. xxx. 8. *Perdes loquentes mendacium.* Psalm. v. 7. *Ne mentimini alter alteri.* Coloss. iii. 9. Et hanc partem rigide tuetur Augustinus: et sunt etiam inter philosophos et poëtas, qui cum eo sentire videantur. Notum illud Homeri (*Iliad.* IX. 312, 313):

[5] Ψεῦδος δὲ μισεῖ πᾶς σοφὸς, καὶ χρήσιμον. Hoc etiam ex STOBÆO, sed qui Menandro, non Cleobulo, tribuit. *J. B.*

[t] *Laudatorum hominum sine reprehensionis nota*] Irenæus ex veteris pres-

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4 An example of the latter (where the damage to the other party is lawful) we have in the feigned flight which Joshua advised his men to execute in order to take Aï; and which other generals have often practised. For here the damage is approved to be lawful in virtue of the justice of the war. And the flight itself means nothing by institution, though the enemy takes it as a sign of fear, which the other is not bound to prevent, using his liberty of going one way or another, quickly or slowly, with gestures and movements such or such. To the same head we must refer the cases in which soldiers have used the arms, standards, uniforms, rigging, of the enemy*.

5 All these things are of such kind that they may be used by any at his own choice, even contrary to custom: because the custom was

* Quere: Whether the standards or colours of each party have not an instituted meaning; and whether a party which deceives the enemy by simulating them is not liable to a severity beyond the usual rules? W.

Ille mihi invisus pariter cum faucibus orci,
Cujus mens aliud condit quam lingua profatur.

Sophocles, *Frag. Creus. apud* Stob.

Aliena vero proloqui nunquam decet:
At vera certam si cui pestem ferunt,
Huic danda venia est si facit quod non decet.

[5] Cleobulus:

Mendacium odit quisquis animitus sapit.

Aristoteles dixit, *κατ' αὐτὸ τὸ μὲν ψεῦδος φαῦλον καὶ ψεκτόν, τὸ δὲ ἀληθὲς καλὸν καὶ ἐπαινετόν· per se mendacium turpe atque vituperabile, veritas pulchra ac laudabilis.* Ethic. Nic. iv. 13.

2 Neque tamen deest in alteram quoque partem auctoritas: primum in sacris literis exempla [t] laudatorum hominum sine reprehensionis nota: deinde veterum Christianorum pronuntiata, Origenis, Clementis, Tertulliani, Lactantii, Chrysostomi, Hieronymi, Cassiani, imo pene omnium, ut ipse fatetur Augustinus, ita dissentiens, ut tamen *magnam quæstionem, latebrosam tractationem, disputationem inter doctos alternantem* (hæc enim omnia ipsius verba sunt) agnoscat.

3 Inter philosophos aperte hinc stant Socrates et discipuli ejus Plato, Xenophon, et alicubi Cicero, et, si Plutarcho ac Quintiliano credimus, Stoici, qui inter sapientis dotes ponunt Lib. i. et ii. et v. *de Rep. Mem.* Socrat. iv. 2. §§ 16, 17. Plut. *de Stoic. contradict.* pp. 1055, 1056. *Orat. Inst.* xii. 1.

byteri institutione didicit docuitque: *de quibus scripturæ non increpant, sed simpliciter sunt positæ, nos non debere fieri accusatores.* Locus est libro IV. cap. 50. [Vide quæ de eo loco diximus in libro Gallico *De Doctrina Morali Patrum*, cap. iii. § 7. *J. B.*]

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introduced by the arbitrary choice of individuals, not as it were by common consent, and is such a custom as binds no one.

IX. 1 More grave is the question concerning those signs which belong to the usual intercourse of men, and to which, when used deceitfully, lies properly belong. There are many passages against lying in the Scriptures, Prov. xiii. 5; xxx. 8; Psalm v. 7; Coloss. iii. 9. And Augustine is rigid on this side, as are some of the philosophers and poets. So Homer, Sophocles, Cleobulus [rather Menander, J. B.], Aristotle.

2 There are, however, authorities on the other side; first, examples of persons in Scripture who told lies, and who are not blamed: and next, opinions of the old Christians, Origen, Clemens, Tertullian, Lactantius, Chrysostom, Jerome, Cassian; indeed almost all, as Augustine himself confesses.

3 Among the philosophers, we have evidently on this side Socrates, and his disciples Plato and Xenophon; and in some places Cicero,

mentiri ubi et quomodo oportet: neque videtur dissentire aliquot in locis Aristoteles, cujus illud καθ' αὑτὸ quod diximus exponi potest communiter, sive re spectata sepositis circumstantiis. Interpres autem ejus Andronicus Rhodius de medico apud ægrotum mentiente sic ait: ἀπατᾷ μὲν, ἀπατεὼν δὲ οὐκ ἔστιν· *decipit quidem, at deceptor non est:* Causam addit: οὐ γὰρ τέλος ἔχει τὴν ἀπάτην τοῦ νοσοῦντος, ἀλλὰ τὴν σωτηρίαν· *non enim propositum sibi habet decipere, sed servare ægrotum.*

Nic. ii. 7; iv. 13.

Paraph. Eth. Nic. v. 8. p. 297.

Inst. Orat. xii. 1.

4 Quintilianus, quem dixi, hanc ipsam partem defendens, pleraque esse ait quæ non tam factis, quam causis eorum vel honesta fiant, vel turpia. Diphilus,

Apud Stob. *Tit.* xii.

Quod pro salute dicitur mendacium
Me judice habere nil potest incommodi.

Quærenti apud Sophoclem Neoptolemo (*Philoctet.* vers. 107):

Non tibi videtur turpe falsiloquentia?

Respondet Ulysses,

Non, si salus nascatur ex mendacio.

Cui similia ex Pisandro et Euripide adferuntur. Et apud Quintilianum lego: *nam et mendacium dicere etiam sapienti aliquando concessum est.* Eustathius Metropolita Thessalonicensis ad secundum Odysseæ: ψεύσεται [u]κατὰ καιρὸν ὁ

Inst. Orat. ii. 17.

[u] Κατὰ καιρὸν] In tempore, ut Donatus loquitur ad *Adelphos* IV. 3. (vers. 18.) *Et ipsum fallere in tempore, quidam de officiis scribentes rectum putant.* Cicero pro Q. Ligario, *aliquod mendacium honestum et misericors* vocat. (Cap. 5.)

[x] *Quatenus et imprudenti accidit*] *Ream linguam non facit nisi rea mens.* Et: *Nemo mentiens judicandus est qui dicit falsum quod putat verum, quia, quantum in ipso est, non fallit ipse, sed fallitur.* Sunt hæc Augustini, *de Verbis Apostoli* sermone XXVIII. [180. num.

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and if we believe Plutarch and Quintilian, the Stoics, who, among the gifts of the wise man, place that, to know how and when to lie. Aristotle in some places appears to be of the same opinion. Andronicus Rhodius, speaking of a physician who tells a lie to his patient, says, *he deceives, but is not a deceiver;* and adds the reason, that *his object is not to deceive, but to save the man.*

4 Many others defend lies for good purposes: Quintilian, Diphilus, Sophocles, Pisander, Euripides, Quintilian again, Eustathius, who brings testimonies from Herodotus and Isocrates.

X. 1 Opinions so widely differing, perhaps we may in some measure conciliate, by a larger or stricter acceptation of the term *lie.* For we do not here use the term *lie,* so as to apply where it is unintended; we may distinguish a *falsehood* and a *lie.* We mean that

σοφός· *mentietur sapiens re urgente:* ubi et ex Herodoto et Isocrate testimonia adfert. Lib. iii. 72.

X. 1 Tam dissidentium sententiarum conciliatio forte aliqua reperiri poterit ex largiore aut strictiore mendacii acceptione. Neque enim hic mendacium sumimus [x]quatenus et imprudenti accidit, quomodo mendacium dicere et mentiri apud Gellium discernuntur: sed de eo agimus quod scienter profertur cum significatione quæ mentis conceptui, sive in intelligendo, sive in volendo, disconveniat. Nam quod primo καὶ ἀμέσως verbis et similibus notis indicatur, sunt mentis conceptus: ideoque non mentitur qui dicit rem falsam quam veram existimat, sed qui dicit rem veram quidem, sed quam falsam putat, mentitur. Significationis ergo falsitas id est quod ad communem mendacii naturam requirimus. Cui consequens est, cum vox aliqua aut sermonis complexio est πολύσημος, id est, plures uno significatus admittit, sive ex vulgi usu, sive ex artis consuetudine, sive ex figura aliqua intelligibili, tunc si animi conceptus uni istarum significationum congruat, non admitti mendacium, [y]etiamsi putetur is qui audit in aliam partem id accepturus.

Thom. 2, 2. q. 110. art. 1. *in resp.* Gell. xi. 11.

2 Verum quidem est talem locutionem usurpatam temere non probandam: sed potest ex accedentibus causis honestari:

2. *ed. B.*] et *Enchiridii* cap. 18. relata a Gratiano in causam XXII. quæstione ii. cap. 3, 4.

y *Etiamsi putetur is qui audit in aliam partem id accepturus*] Quomodo Abraham captiose loquebatur cum servulis, ita judicante et probante Ambrosio, (*De Abrah.* cap. 8) quem sequitur Gratianus post c. *si quælibet,* dicta causa XXII. quæst. ii. cap. 20. [Plus est in hoc exemplo, quam Auctor putat. Sed de eo fusius agendi locus fuit in Notis nostris Gallicis. *J. B.*]

which is knowingly uttered with a meaning which is at variance with the conception of the mind, either as to what it understands or as to what it wills. For that which is primarily and immediately indicated by words and the like signs, is the conception of the mind; and therefore he does not lie who says a thing which is false, but which he believes to be true; and he does lie who says a thing which is true which he believes to be false. Therefore the falsity of the meaning is what we require to the common notion of a lie. From which it follows that if any word or phrase have several significations, either by common usage, or technically, or figuratively, then if the conceptions of the mind conform to one of these significations, there is no lie, though he who hears it takes it in another.

2 But still it is true that such a mode of speaking, lightly used, is not to be approved of; although, from accidental causes, it may

puta si id pertineat ad erudiendum eum qui curæ nostræ est traditus, aut ad evitandam iniquam interrogationem. Prioris
Joh. xi. 11. generis exemplum ipse Christus dedit, cum diceret, *Lazarus amicus noster dormit,* quod apostoli accipiebant tanquam de
Joh. ii. 20, 21. dormitione somni diceretur. Et quod de templo instaurando ipse dixerat, intelligens hoc de suo corpore, Judæos sciebat accipere de templo proprie dicto. Sic et cum apostolis
Luc. xxii. 30. adinstar Phylarcharum apud Hebræos sedes eximias et regi
Matth. xxvi. 29. proximas duodecim promitteret, et alibi vini novi potationem in patris regno, satis scivisse videtur non aliter hoc ab illis
Act. i. 6. accipi quam de regno aliquo hujus vitæ, cujus spe ad ipsum momentum Christi ad cœlum ascensuri pleni erant. Idem
Matth. xiii. 13. alibi per fabularum ambages populum alloquitur, ne audientes ipsum intelligerent, nisi scilicet animi attentionem talem ac docilitatem afferrent qualem afferri par erat. Posterioris usus
Tacit. *Ann.* xi. 34. exemplum ex profana historia dari potest in L. Vitellio, cui

[z] *Quin suspensa et quo ducerentur inclinatura responderet*] Idem Tacitus *Historiarum* III. (cap. 3.) *Incerta disseruit, tracturus interpretationem prout conduxisset.* Item: *ita compositus, ut ex eventu rerum adversa abnueret vel prospera agnosceret.* (Ibid. c. 52.)

[a] *Hebræorum*] Quorum et hoc est: מותר לשנית מפני השלום *licet perplexe loqui boni causa.* Citat doctissimus Manasses Ben-Israel in suo conciliatore, quæstione XXXVII. Chrysostomus I. *de Sacerdotio: ἀπατεὼν ἐκεῖνος ἂν εἴη καλεῖσθαι δίκαιος, ὁ τῷ πράγματι κεχρημένος ἀδίκως, οὐχ ὁ μεθ' ὑγιοῦς γνώμης τοῦτο ποιῶν· fallax jure vocetur qui re tali injuste utitur, non qui salutari proposito.* (in fin. Lib.)

[b] *Puta cum Dei honos*] Philo *de Vita Mosis: ἐπ' ἔργοις ἅπερ ἀναφέρεται εἰς Θεοῦ τιμὴν, δι' ἃ μόνα καὶ τὴν ἐν τοῖς ἄλλοις τὸ ἦθος κατεψευσμένον,*

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become proper: as for instance, if it be used in instructing him who is committed to our care, or to evade an unfair question. Of the former kind Christ himself gave an example, when he said, *Our friend Lazarus sleepeth:* which the Apostles received as if he had spoken of ordinary sleep. And what he said of rebuilding the temple, intending his own body, he knew that the Jews would accept of the temple, properly so called. So when he promised his disciples that they should sit upon twelve thrones and judge the twelve tribes of Israel; and when he spoke of drinking new wine in his Father's kingdom; he appears to have known that they would take his words as implying some kingdom and authority to be given him in this life, of which hope they were full to the very moment of Christ's ascension. And in other places he teaches the people by fables and parables, that hearing they might not understand; that is, except they brought to the work of listening proper attention and docility.

An example of the latter kind (to avoid unfair questions) we

Narcissus instabat, aperiret ambages et veri copiam faceret: sed non ideo pervicit, [z]quin suspensa et quo ducerentur inclinatura responderet. Dictum [a]Hebræorum huc pertinet: אם יודע אדם להמוד את דבריו מוטב ואם לא ישתוק *si quis norit uti perplexiloquio, recte: sin minus, taceat.*

3 Contra accidere potest, ut tali loquendi genere uti non modo illaudabile sit, sed et improbum, [b]puta cum Dei honos, [c]aut amor proximo debitus, aut reverentia adversus superiorem, aut rei quæ agitur natura exigunt, ut quod animo cogitatur omnino patefiat: sicut in contractibus diximus id aperiendum quod natura contractus intelligitur exigere: quo sensu non incommode accipi potest Ciceronis illud, *tollendum* *De Offic.* iii. 15. *esse ex rebus contrahendis omne mendacium*, desumtum ex veteri lege Attica *κατὰ τὴν ἀγορὰν ἀψευδεῖν*: quibus in Demosth. *in Lept.* p. 363 A. locis mendacii vox videtur ita laxe accipi ut etiam obscuram locutionem includat. At nos proprie loquendo a mendacii notione id ipsum jam exclusimus.

ἀναγκαῖον ἦν ἀληθεύειν. ἀλήθεια γὰρ ὀπαδὸς Θεοῦ· de factis loquor quæ ad Dei honorem pertinent, in quibus solis veracem esse oportuit, etiam si quis ceterum ingenio esset mendace. Veritas enim Dei comes. (Pag. 679 E.) Augustinus epistola VIII. *Alia quæstio est, sitne aliquando mentiri viri boni: et alia quæstio est, utrum scriptorem sanctarum scripturarum mentiri oportuerit.* Vide quæ infra § XV.

[c] *Aut amor proximo debitus*] Æschylus *Prometheo* (pag. 39. *Ed. H. Stephan.*) ⟦v. 609⟧:

Λέξω τορῶς σοι πᾶν, ὅ τι χρήζεις μαθεῖν,
Οὐκ ἐμπλέκων αἰνίγματ', ἀλλ' ἁπλῷ λόγῳ,
Ὥσπερ δίκαιον πρὸς φίλους οἴγειν στόμα·

Dicam diserte quicquid audire expetis,
Sermone nudo, non per implicitos modos,
Quo more amicos alloqui verum ac bonum est.

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may take from profane history in the case of L. Vitellius, whom Narcissus urged to explain the plot and tell the truth; but only got him to use doubtful expressions which might be drawn either way. There is a Hebrew proverb, that if any one cannot talk without saying anything decided, he had better hold his peace.

3 On the other hand, it may happen that to use such a mode of speech is not only unbecoming, but wicked; for example, when the honour due to God or the love due to our neighbour, or the reverence due to a superior, or the nature of the matter, requires us to say what we have in our mind: as in contracts, we have said that all is to be disclosed which the nature of a contract is understood to require; in which sense we very properly understand that of Cicero, that lying must altogether be taken away from contracts: in which case *lying* is, it would seem, to be understood so laxly as to include even obscure language; which however we have excluded from our notion of a lie.

XI. 1 Ad communem ergo mendacii notionem requiritur, ut quod dicitur, scribitur, notatur, innuitur, intelligi aliter nequeat, quam in eum sensum, qui a mente proferentis discrepet. Huic autem notioni laxiori strictior mendacii, qua naturaliter illicitum est, significatio differentiam aliquam propriam adjiciat necesse est, quæ, si recte res inspiciatur, saltem secundum communem gentium existimationem, nulla videtur alia dari posse præter repugnantiam cum jure existente ac manente ejus ad quem sermo aut nota dirigitur: nam sibi neminem mentiri, ut maxime falsum proferat, satis constat. Jus hic intelligo non quodvis et rei extrinsecum, sed quod proprium sit huic negotio atque cognatum. Id autem nihil est aliud quam [d]judicandi libertas, quam homines colloquentes his quibus colloquuntur debere, quasi pacto quodam tacito, intelliguntur. Hæc enim nec alia est mutua illa obligatio quam homines introduci voluerant, simul atque sermone notisque similibus uti instituerunt: nam sine tali obligatione inane fuisset tale repertum.

2 Desideramus autem ut quo tempore sermo fit, jus illud

[d] *Judicandi libertas*] Hinc *furari cor* Hebræis dicitur qui adimit sciendi vias: Genes. xxxi. 26, 27. et ibi Onkelos et LXX. Rabbi David libro radicum, et Rabbi Salomo in commentario, et Abenesdra.

[6] Addidi vocem *falso*, quæ in omnibus Edd. excidit, et necessariam om-

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XI. 1 To the common notion of a lie, then, it is required that what is said, written, conveyed by signs or gestures, cannot be understood otherwise than in that sense which differs from the mind of the utterer. But to this laxer notion of a lie in general, must be added some stricter proper difference, to define a lie as unlawful by Natural Law: and this difference, if we examine the matter, can be no other, according to the common estimation of nations, than a discrepancy with some existing and permanent right of the person to whom the words or signs are addressed: for that no one lies to himself, is sufficiently evident. By *right*, I do not here mean any right extrinsic to the matter, but something proper and cognate to the matter in hand. But this right is no other than the liberty of judging of my future acts, which I, speaking with other men, am understood to owe to them. This is merely that mutual obligation which men wished to introduce when they instituted the use of speech and the like signs. For without such an obligation the invention of such means of communication would be useless.

2 We desire then, that while speech is thus used, this right should subsist and remain: for it may be that the right may have existed,

subsistat ac maneat: fieri enim potest ut jus quidem fuerit, sed sublatum sit, aut tollatur ex alio jure superveniente, sicut debitum acceptilatione aut conditionis cessatione. Tum vero requiritur ut jus quod læditur ejus sit quicum loquimur, non alterius (sicut et in contractibus injustitia non nascitur, nisi ex læso jure contrahentium). Huc forte non male referas, quod veriloquium ad justitiam refert post Simonidem Plato, et quod *L. 1. de Rep.* p. 331 c, d. mendacium, illud vetitum, sacræ literæ sæpe describunt falso [G]testimonio sive elocutione adversus proximum, et quod ipse Augustinus in mendacii natura constituenda ponit [e]fallendi voluntatem. Et Cicero quæstionem de veritate eloquenda *De Offic.* i. 10. referri vult ad justitiæ fundamenta.

3 Tolli autem videtur posse jus quod diximus, sicut consensu ejus quicum agimus expresso, ut si quis prædixerit se falsa dicturum et alter permiserit, ita et tacito æquave ratione præsumto, aut oppositione juris alterius quod communi omnium judicio multo plus valeat. Hæc recte intellecta multas nobis suppeditabunt illationes, quæ ad concilianda sententiarum supra designatarum dissidia non parum valituræ sint.

nino esse, vel nonum Præceptum Decalogi, manifestum facit cuivis. *J. B.*

[e] *Fallendi voluntatem*] Lactantius *Institutionum* vi. 18: *Ut non mentiatur unquam decipiendi aut nocendi causa.* [Locus autem Augustini est in *Enchiridio: Omnis autem, qui mentitur, contra id, quod animo sentit, loquitur, voluntate fallendi.* Cap. 22, num. 7. *J.B.*]

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but may have been taken away, or may be taken away by some supervenient right, as a debt is taken away by an acknowledgment of payment, or by the cessation of the condition. It is also required that the right which is violated, be a right of the person with whom we speak, not of another, (as in contracts injustice does not arise, except from the violation of the right of the contracting parties). To this view you may properly apply what Plato says, after Simonides, referring veracity to justice; and also that lies, that is, forbidden lies, are often described in Scripture as false witness, or speaking against our neighbour; and that Augustine makes the essential nature of a lie consist in the intention to deceive. Also Cicero wishes the question of speaking truth to be referred to justice as its principle.

3 Now the right of which we have spoken, may be taken away either by the express permission of him with whom we deal; as if any one have announced that he would tell falsehoods, and the other have permitted it; or by tacit permission, or permission presumed on fair reason; or by the opposition of another right which, by the common opinion of all, is of much more importance.

These principles, rightly understood, will give us many conse-

XII. Primum est, etiamsi quid dicatur quod falsam habeat significationem infanti aut amenti, in eo mendacii culpam non esse. Videtur enim communi omnium hominum sensu permissum esse,

Lucret. i. v. 938.

Ut puerorum ætas improvida ludificetur.

Inst. Orat. xii. 1.

Et Quintilianus de pueris locutus: *utilitatis*, inquit, *eorum gratia multa fingimus.* Ratio proxima est, quia cum in infantibus et amentibus non sit judicii libertas, non potest eis circa eam libertatem injuria fieri.

XIII. 1 Secundum est, quoties sermo ad eum dirigitur qui non decipitur, etiamsi tertius inde falsam hauriat persuasionem, nullum esse mendacium: Non ratione ejus ad quem sermo est: quia illi libertas manet integra, plane ut illis quibus id intelligentibus fabula narratur, aut apud quos profertur sermo figuratus, κατ' εἰρωνείαν aut καθ' ὑπερβολὴν, quæ figura, ut Seneca ait, [f]ad verum mendacio venit: et Quintiliano ementiens superjectio dicitur. Neque ratione ejus qui obiter id audit: quia cum eo non agitur, ideoque nulla est ad illum obligatio. Imo si ipse sibi opinionem informat de eo quod non ipsi, sed alteri dicitur, habet quod sibi non alteri rem

Lib. vii. *de Benef.* 23. [[*Inst. Orat.* viii. 6. § 67, ubi tamen Spaldingius *decens* legit.]]

[f] *Ad verum mendacio venit*] *Incredibilia affirmat, ut ad credibilia perveniat.* Seneca ibidem.

[g] *Chrysostomus et Hieronymus*] Ad-

quences, which will be of great use in reconciling the dissentient opinions above mentioned.

XII. The first result is, that though any thing be said to an infant, or a person out of his mind, which has a false signification, it does not involve the guilt of a lie. The common sense of mankind permits the thoughtless age of childhood to be deluded. So Quintilian. The reason is that they have no liberty of judgment, and therefore they cannot be wronged with regard to such liberty.

XIII. 1 The second remark is, that so long as our speech is directed to him who is not deceived, it is no lie, although a third person should thereby imbibe a false persuasion. It is not a lie with regard to him whom we address, because his liberty of judging is not disturbed, as in the case of those to whom a fable is told, which they know to be such, or to whom figurative language is used, or irony, or hyperbole; which figure, as Seneca says, arrives at the truth by a lie, and which Quintilian calls an allowable exaggeration. Nor is it a lie with regard to him who accidentally hears it: because we have nothing to do with him, and therefore have no obligation to him. If he form an opinion from what is said to another, and not to himself, he must take the responsibility of his opinion on himself, and not

imputet. Quippe, si recte judicare volumus, illius respectu sermo non sermo est, sed res quæ significare quidlibet potest.

2 Nihil ergo peccavit aut Cato Censorius, qui sociis auxilia falso est pollicitus, aut Flaccus, qui hostium urbem ab Æmilio expugnatam aliis narravit, quanquam eo hostes decepti sunt: cui rei similem de Agesilao narrat Plutarchus. Nihil enim hic dictum hostibus: nocumentum autem quod inde secutum est extrinsecum quid est, et per se non illicitum optari aut procurari. Ad hoc genus [g] Chrysostomus et Hieronymus retulerunt Pauli sermonem, quo Antiochæ Petrum ut nimium judaizantem reprehendit. Censent enim Petrum satis intellexisse non id serio fieri: interim vero consultum infirmitati adstantium.

Liv. xxxiv. 12. *App. Hisp.* p. 301. *In Agesil.* p. 505 c. Chrysost. *in Galat.* Tom. III. p. 730. Hier. *Epist. ad August.* Tom. II. p. 336, *et seqq.* *Galat.* ii. 14.

XIV. 1 Tertium est, quoties certum est eum ad quem sermo est, libertatis suæ in judicando læsionem non ægre laturum, imo gratias habiturum eo nomine, ob commodum aliquod quod inde assequitur, tunc quoque mendacium stricte dictum, id est injuriosum, non committi, sicut furtum non perpetraret qui ex præsumta domini voluntate rem ipsius exiguam consumeret, ut inde magnam eidem utilitatem pararet. In his enim

de Cyrillum *adversum Julianum* libro IX. circa finem. Nec multo aliter Tertullianus primo et tertio *contra Marcionem.* [Lib. I. c. 20, IV. 3.]

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throw it on another. For properly speaking, the speech is, with regard to him, no speech, but a mere thing which may signify any thing.

2 Therefore Cato the Censor was not guilty of a lie when he falsely promised assistance to his allies; nor Flaccus, who related to others that the enemy's city was taken; though the enemy was thus deceived; and Plutarch relates a similar act of Agesilaus. For in these cases nothing was said to the enemy: and the damage to them which followed is extrinsic to our act, and is in itself not unlawful to be wished or procured. To this head Chrysostom and others refer the discourse of Paul, in which at Antioch he reprehended Peter as judaizing too far: for they conceive that Peter sufficiently understood that that was not seriously done; and in the mean time, that the infirmity of the bystanders was consulted.

XIV. 1 A third case [in which there is no lie] is when it is certain that he who is addressed will not be dissatisfied with the disturbance of his liberty in judging, but rather will be gratified at the course taken, on account of some advantage which follows therefrom. In this case there is not a lie strictly so called, that is, a wrongful lie; just as he would not be guilty of theft who, presuming the consent

quæ adeo certa sunt, præsumta voluntas pro expressa habetur. Volenti autem constat injuriam non fieri. Sic ergo videtur non peccare, qui aut ægrotantem amicum persuasione non vera solatur, ut Arria Pætum filio mortuo, quæ historia est [h]in Plinii Epistolis: aut in prælio periclitanti ex falso nuntio animum addit, quo incitatus victoriam et salutem sibi pariat,
Ubi supr. ac sic deceptus non capiatur, quemadmodum Lucretius loquitur.

Apud Stob. *Serm.* 12. [*Cyrop.* 1. 6. § 19.] 2 Democritus: *ἀληθομυθεύειν χρεὸν ὅπου λώϊον· omnino veriloquio utendum est, ubi id est melius.* Xenophon: *φίλους δίκαιον ἐξαπατᾶν, ἐπὶ δὲ ἀγαθῷ· amicos decipere licet, ip-*
Strom. vii. 9. p. 863. *sorum bono.* Et Clemens Alexandrinus concedit *ψεύδεσθαι ἐν θεραπείας μέρει, mendacio uti pro remedio.* Maximus
Dissert. iii. p. 30. Tyrius: *καὶ ἰατρὸς νοσοῦντα ἐξαπατᾷ, καὶ στρατηγὸς στρατόπεδον, καὶ κυβερνήτης ναύτας· καὶ δεινὸν οὐδέν· et medicus ægrotum, et imperator exercitum, et gubernator nautas decipit: nec quicquam in hoc mali est.* Rationem reddit ad
Pag. 381. Platonem Proclus: *τὸ γὰρ ἀγαθὸν κρεῖττόν ἐστι τῆς ἀληθείας· nam quod bonum est, id vero est melius.* Tale illud
Lib. iv. Socr. c. 2. § 16. Liv. i. 27. [i]apud Xenophontem, socios jamjam adfore, et Tulli Hostilii,

[h] *In Plinii epistolis*] III. 16.

[i] *Apud Xenophontem*] *Et Agesilaus cum in Bœotiam venisset et intellexisset Pisandrum navali prælio victum a Pharnabazo et Conone, jussit militibus suis contrarium dici, coronatusque incedens sacra fecit pro victoria.* Plutarchus *Agesilao* (pag. 605 c.)

[k] *Qui habet jus supereminens*] *Iliados* secundo Agamemnon Græcorum Im-

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of the owner, should consume some small matter, and so procure him great gain. For in matters which are thus certain, a presumed will is held equivalent to an expressed will; and to a willing man, no wrong is done. So he is not guilty of lying who consoles a sick friend with a false persuasion; as Arria did Pætus when his son was dead, which history we have in Pliny's Epistles; nor he who, when the battle is wavering, gives courage to his party by false news, and so incites them to obtain the victory; and thus catches them that they may not be caught, as Lucretius says.

2 That we may deceive our friends for their good, is asserted by Democritus, Xenophon, Clemens Alexandrinus, Maximus Tyrius, Proclus. [See.] Such cases are Xenophon's declaration that the allies were at hand: and that of Tullus Hostilius, that the Alban army was making a circuit by his order: and that of Quintius the consul, a wholesome lie, as the historians speak, that the other wing of the enemy was in flight; and numerous other passages in historians. And it may be remarked, that the disturbance of the power of judging is in this case of the less consequence, inasmuch as it is momentary only,

suo jussu circumduci Albanum exercitum: et Quinctii consulis, Liv. ii. 64.
ut historiæ loquuntur, salubre mendacium, hostes ab altero cornu fugere: ac similia passim apud historicos. Notandum autem est, læsionem judicii in hoc genere eo minoris esse, quia ferme momentanea est, pauloque post aperitur veritas.

XV. 1 Quartum et superiori affine est, quoties [k]qui habet jus supereminens in omnia jura alterius, eo jure bono ipsius sive proprio, sive publico utitur. Et hoc maxime spectasse videtur Plato, qui imperium habentibus concedit falsum *iii. de Rep.* p. 389 B.
dicere. Idem cum [l]medicis modo dare videatur, modo adimere, discrimen hoc adhibendum videtur, ut priore loco medicos intelligat publice ad hoc vocatos, posteriore eos qui privatim id sibi arrogant. Deo tamen, quanquam jus summum in homines habenti, non convenire mendacium recte agnoscit idem Plato, quia infirmitatis nota est ad talia confugere.

2 Exemplum forte inculpatæ falsiloquentiæ, laudante etiam Philone, dari poterit [m]in Josepho, qui regia vice impe- *De Joseph.* p. 550, *et seqq.*
rans fratres primum quasi exploratores, deinde quasi fures, ficte nec ita sentiens accusat. Et in Solomone, qui sapientiæ 1 *Reg.* iii. 25.

perator (vers. 73):

Πρῶτα δ' ἐγὼν ἔπεσιν πειρήσομαι ᾗ θέμις ἐστι,
Καὶ φεύγειν σὺν νηυσὶ πολυκληῗσι κελεύσω.

Ante tamen Danaos verbis tentabo, (sinit fas)
Utque citi fugiant ærata classe monebo.

[l] *Medicis*] Exempla medicorum affert Chrysostomus dicto libro I. *de Sacerdotio.*

[m] *In Josepho*] *Cum fratribus dispensatoria severitate crimen exploratio-*

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and the truth very soon comes out.

XV. 1 A fourth case of the same kind [in which a falsehood is not a lie] is when he who has a supereminent right over the rights of another, uses that right either for his private good or for the public good. And this Plato seems to have had in view, when he allows the governors of a state to deceive. And when Plato sometimes seems to allow and sometimes to disallow this practice in physicians, it would seem that this difference is to be taken, that in the former case he means physicians who are publicly called to this office of giving false hopes; in the latter case, those who arrogate such an office to themselves. But God, though he have the supreme right over men, cannot use lies, as Plato rightly acknowledges; because it is a mark of our weakness to take refuge in such means.

2 We have an example of falsehood, which even Philo praises, in Joseph; who, acting with royal power in Egypt, accuses his brothers first of being spies, and then of stealing, knowing that it was not so. And again in Solomon, when he gave orders to slay the child, about which the mothers disputed, though he never intended this to be done. So Quintilian.

divinitus datæ specimen dedit, cum apud mulieres de partu litigantes voces eas protulit quæ voluntatem scindendi infantis significarent, cum animus ei longissime a tali voluntate abesset, et veræ matri suum partum attribuere vellet. Quintiliani est dictum: *aliquando exigit communis utilitas ut etiam falsa defendantur.*

Inst. Orat. ii. 17. [[§ 36.]]

XVI. Quintum esse potest, [n]quoties vita innocentis, aut par aliquid aliter servari, et alter ab improbi facinoris perfectione aliter averti non potest: quale fuit factum Hypermnestræ quæ hoc nomine laudari solet,

Horat. iii. *carm.* xi. v. 35.

[o]Splendide mendax, et in omne virgo
Nobilis ævum.

XVII. 1 Latius quam quæ jam diximus patet quod passim statuunt sapientes, apud hostem falso sermone uti licere. Sic regulæ de non mentiendo exceptionem nisi adversus hostes

nis inureret, ait Cassiodorus *de Amicitia.* [Cap. *De Naturali Motu,* pag. 637. *Edit. Genev.* 1650. Sed is liber non est Cassiodori.]

[n] *Quoties vita innocentis, aut par aliquid aliter servari, et alter ab improbi facinoris perfectione aliter averti non potest*] Augustinus in v. Psalmum, (§ 7) relatus a Gratiano in causam xxii. quæst. ii. c. ne quis 14. [Sed ita ut verba paullo diversa sint. *J. B.*] *Duo vero sunt genera mendaciorum in quibus non est magna culpa, sed tamen non sunt sine culpa, cum aut jocamur, aut proximo consulendo mentimur. Illud autem primum in jocando ideo non est perniciosum, quia non fallit. Novit enim ille, cui dicitur, causa jocandi fuisse dictum. Secundum autem ideo minus est, quia retinet nonnullam benevolentiam.* Tertullianus libro *de Pudicitia* inter delicta quotidianæ incursationis, quibus omnes sumus objecti, ponit, necessitate mentiri. (Cap. 19.)

[o] *Splendide mendax*] Ubi scholiastes, *decenter. Pulchrum est enim pro justitia mentiri.* Simile est illud Chrysostomi de Rahabe: ὢ καλοῦ ψεύδους, ὢ καλοῦ δόλου, οὐ προδιδόντος τὰ θεῖα, ἀλλὰ φυλάττοντος τὴν ἀλήθειαν, aut, ut alii habent codices, τὴν εὐσέβειαν, *ô pulchrum mendacium, ô laudabilem dolum, non prodentis res divinas, sed custodientis veram pietatem.* Augustinus de Obstetricibus Ægyptiis: *ô magnum humanitatis ingenium, ô pium pro salute mendacium!* Laudat easdem obstetrices, et præmia illis data, etiam æterna, credit Hieronymus ad Ezechielem xxviii. (pag. 481) et ad Esaiam lxv. (pag. 249) Ambrosius *ad Syagrium* libro viii. (Epist. lxiii.) Augustinus ipse, ut solet, varians, ad Consentium contra mendacium c. 15. Tostatus ne-

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XVI. A fifth case may be when the life of an innocent person, or something of like value, cannot otherwise be preserved, and when another person cannot otherwise be withheld from the perpetration of a wicked act: as in the case of Hypermnestra, *nobly false.*

XVII. 1 What learned men commonly lay down, goes further than what we have said;—namely, that we may utter falsehoods to an enemy. Thus to the rule *not to lie*, an exception, *unless to an enemy*, is added by Plato, Xenophon, Philo among the Jews, Chrysostom

addit Plato, Xenophon, Philo inter Judæos, [p]inter Christianos *Lib. ii. de Rep. p. 332 c.*
Chrysostomus. Quo forte non male referas quod in sacris *Lib. i. De Cyri instit.*
litteris extat Jabesitarum in obsidione mendacium, et factum *c. 6. et iv. Socr. c. 2. § 16.*
non dissimile Prophetæ [q]Elisæi: et Valerii Lævini, qui Pyr- *De Migr. Abr. [immo De Cherub. p. 110 D.]*
rhum [7]a se interemtum jactabat.

2 Ad tertiam, quartam, et quintam observationum earum *De Sac. L. i. 1 Sam. xi. 10.*
quas jam posuimus, pertinet Eustratii Metropolitæ Nicæensis *2 Reg. vi. 18. et seqq.*
locus ad sextum *Nicomachiorum*: ὁ εὖ βουλευόμενος, οὐκ ἐξ *Cap. 9.*
ἀνάγκης ὁ ἀληθεύων ἐστίν· ἐστὶ γάρ ποτε τὸν ὀρθῶς βουλευόμενον καὶ περὶ αὐτοῦ τοῦ ψεύδους βουλεύσασθαι, ἵν' ἐπιτηδὲς ψεύδεται πρός τινα ἢ ἐχθρὸν ὄντα, ἵνα σφάλῃ αὐτὸν, ἢ φίλον, ἵν' ἐκκόψῃ αὐτὸν ἀπὸ κακοῦ, καὶ τούτων τὰ παραδείγματα ἐν ταῖς ἱστορίαις πολλά· *qui recte consultat non utique et verum dicit. Fieri enim potest ut quis recte consultans hoc ipsum consultet quo pacto de industria mentiatur, aut hosti ut eum fallat, aut amico ut eum a malo*

gat in eo peccatum. Hæsitant Augustinus Lib. II. quæstione super Exodum, (Cap. 1.) Thomas 2, 2. quæstione cx. art. 4. resp. ad 4. et ibi Cajetanus. Vide si vacat et moriæ encomio Erasmum, et doctissimum Masium ad Josuam ii. 5. [Verba CHRYSOSTOMI de Rahabe, leguntur Orat. II. *De Pœnitentia*, Tom. VI. pag. 775. *Ed. Savil.* Adde BASILIUM, *in Principium Proverbiorum*, Tom. I. pag. 402. *Ed. Paris.* 1638. *J. B.*]

[p] *Inter Christianos Chrysostomus*] Sic loquens: εἰ βούλειγε τῶν στρατηγῶν τοὺς ἐξ αἰῶνος εὐδοκιμάσαντας ἐξετάσαι, τὰ πλείονα αὐτῶν τρόπαια τῆς ἀπάτης εὑρήσεις ὄντα κατορθώματα, καὶ μᾶλλον τούτους ἐπαινουμένους ἢ τοὺς φανερῶς κρατοῦντας· *si nobilissimos ducum ad examen voces, pleraque eorum tropæa reperies fraudum esse opera, magisque tales laudari quam qui aperte agendo vicerunt.* [*De Sacerdotio*, Lib. I. cap. 5.]

[q] *Elisæi*] Ejusdem Elisæi alterum simile est 2 Regum viii. 10. ita ut legunt Masoretæ, id est, secundum קרי, quod sequitur latina vulgata versio.

[7] Habet hoc Auctor sine dubio e FRONTINO, sed qui alio modo rem refert, ut non satis ad rem faciat: VALERIUS LÆVINUS (inquit) *adversus Epirotarum Regem, occiso quodam gregali, tenens gladium cruentum, exercitui utrique persuasit, Pyrrhum interemtum. Strateg.* Lib. II. c. 4. num. 9. Vide PLUTARCHUM, *Vit. Pyrrh.* pag. 393 E, F. Aptius fuisset exemplum num. 10. sequ. ubi Jugurtha falso Marium a se interemtum jactat: de quo vide SALLUSTIUM, *Bell. Jug.* cap. 107. *Ed. Wass.* *J. B.*

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among the Christians. And to this case you may refer the promise of the men of Jabesh (1 Sam. xi. 10), that they would come out on the morrow; and the act of Elisha when he misled his pursuers (2 Kings vi. 19); and the saying of Valerius Lævinus who boasted that he had killed Pyrrhus.

2 To the third, fourth and fifth of the preceding remarks belongs a passage of Eustratius on Aristotle's Ethics. And Quintilian says, that a lie to prevent a murder, or the destruction of one's country,

Inst. Orat. xii. 1.

liberet: quarum rerum exemplis plenæ sunt historiæ. Et Quintilianus, si ab homine occidendo grassator avertendus sit, aut hostis pro salute patriæ fallendus, quod alias in servis reprehendendum sit, fore ait in ipso sapiente laudandum.

Thom. 2, 2. q. 110. art. 1. et 3. Covar. *in c. quamv. de pact. in* 6. p. 1. § 1. n. 15. Soto, *de Just.* v. q. 6. art. 2. Tolet. iv. 21; v. 58. Less. ii. *de Just.* c. 42. *dub.* 9.

3 Non placent hæc scholæ actorum paulo ante sæculorum, ut quæ unum ex veteribus [r] Augustinum ferme in omnibus sequendum sibi delegerit. Sed eadem schola tam ab omni usu abhorrentes admittit interpretationes tacitas, ut dubitari possit an non satius sit adversus quosdam falsiloquium admittere in iis quos diximus casibus, aut eorum aliquibus, (nihil enim definiendum hic sumo) quam ista a falsiloquio tam indiscrete eximere: ut cum dicunt, nescio, intelligi posse nescio ut dicam; non habeo, intelligi posse ut tibi dem; et id genus alia quæ sensus communis repudiat, et quæ si admittantur, jam nihil obstabit quominus qui quid affirmat id ipsum negare, qui negat affirmare dicatur.

4 Verissimum quippe est nullam omnino esse vocem [s] quæ non ambiguum recipiat, cum omnes præter significatum quem

[r] *Augustinum*] Contra cujus posteriorem in hac re sententiam scripsit Rupertus Abbas.

[s] *Quæ non ambiguum recipiat*] Id Chrysippus defendit apud Gellium libro XI. c. 12. Et Seneca *de Beneficiis* secundo, capite 34. *Ingens est copia rerum sine nomine, quas non propriis appellationibus notamus, sed alienis commodatisque.*

[t] *Alterum habeant secundæ*] Augustinus *de Magistro: nullum nos signum comperisse quod non inter cetera quæ significat, se quoque significet.* (Cap. 7.) ⟦num. 20.⟧

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though at other times a thing blameable in a slave, is then commendable in a free man.

3 These doctrines are not approved of by the school of Theologians of more recent times, who have followed Augustine almost exclusively in all points. But this same school allows of tacit interpretations, which are so repugnant to common usage, that we may doubt whether it would not be better to admit false speaking towards some parties, in the cases of which we have spoken, or some of them, (for I do not here pretend to give accurate rules), rather than thus make such indiscriminate exceptions as to *what is* false speaking: thus when they say, *I do not know,* they hold that it may mean, *I do not know that I shall tell you;* when they say, *I have not,* they hold that it may mean, *I have not to give to you;* and others of this kind, which the common sense of mankind repudiates; and which, if they are admitted, there is no reason why he who affirms may not be held to deny, and he who denies to affirm.

4 For it is undoubtedly true, that there is no word which does not admit of an ambiguous sense, since all words have, besides

vocant primæ notionis, [t]alterum habeant secundæ, cumque varium [u]secundum varias artes, tum vero alios quoque ex translatione ac similibus figuris. Neque magis eorum commentum probo, qui, quasi vocem non rem exhorrescerent, joca vocant ea quæ vultu ac pronuntiatione maxime seria proferuntur.

XVIII. Sciendum vero quæ de falsiloquio diximus ad asserentem sermonem, et quidem talem qui nulli nisi publico hosti noceat, [x]non ad promittentem referenda. Nam ex promissione, ut jam modo dicere cœpimus, jus speciale ac novum confertur ei cui fit promissio: idque inter hostes etiam locum habere, sine ulla hostilitatis jam existentis exceptione, neque tantum in promissis expressis, sed et in tacitis, ut in colloquii postulatione ostendemus, cum ad eam partem, quæ de fide in bello servanda est, ventum erit.

XIX. Illud quoque ex superiori, quæ de jurejurando fuit, dissertatione repetendum est, sive id assertivum sit, sive promissivum, vim habere excludendi omnes exceptiones, quæ

[u] *Secundum varias artes*] Vide quæ supra notata ad paragraphum decimum.

[x] *Non ad promittentem*] Distinguit hæc et Agesilaus et cum eo Plutarchus: *τὸ μὲν σπεισάμενον ἀδικεῖν, τῶν Θεῶν ἐστι καταφρονεῖν· ἐν δὲ τῷ παραλογίζεσθαι τοὺς πολεμίους, οὐ μόνον τὸ δίκαιον, ἀλλὰ καὶ δόξα πολλὴ, καὶ τὸ μεθ' ἡδονῆς κερδαίνειν ἔνεστι· federa violare, Deos est contemnere. Extra ea verbis hostem decipere, non justum modo est, sed et gloriam habet, et cum lucro voluptatem.* [*Vit. Agesil.* pag. 600 D. Tom. I. *Ed. Wechel.*]

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their primary meaning, or signification of first notion, another meaning, the signification of second notion, and that, various according to the various technical applications, and other meanings from metaphor or other figures. Nor do I more approve the device of those who, as if they were afraid of the word only and not the thing, call those expressions *jokes*, which are uttered with the most serious countenance and manner of delivery.

XVIII. But it is to be observed that what we have said of false speaking in assertory discourses, applied so that it can damage none except a public enemy, is not to be referred to promissory declarations. For from a promise, as we have partly said, a new and special right is conferred on him to whom the promise is made; and this holds even between enemies, without any exception as to hostility existing at the moment; and not only in express promises, but also in tacit ones, as we shall shew in speaking of parley, when we come to that part which concerns the keeping of faith in war.

XIX. Further, we must again apply what we have said in our

ex persona ejus quicum agimus peti possent, quia non cum homine tantum, sed et cum Deo res est, cui per jusjurandum obligamur, etiamsi homini jus nullum nasci possit. Ibidem et illud diximus, non sicut in alio sermone, ita in jurato, ut a mendacio excusemur, admitti interpretationes verborum quasvis non plane inusitatas: sed omnino veritatem requiri eo in sensu quem homo exaudiens intelligere fide optima existimatur: ut plane detestanda sit illorum impietas, qui ut pueros talis, ita viros jurejurando fallendos asserere non dubitabant.

XX. 1 Scimus etiam fraudium, quas concessas naturaliter diximus, genera quædam a populis aut hominibus nonnullis repudiata: sed id non accidit ob injustitiæ opinionem, sed ob eximiam quandam animi celsitudinem, interdum et virium
[[xii. 59.]] fiduciam. Exstat apud Ælianum dictum Pythagoræ, duabus rebus hominem ad Deum proxime accedere, vera [8]semper lo-
Protrept. c. 20. quendo, et benefaciendo aliis: et apud Jamblichum veracitas
Nic. iv. 2. dux dicitur ad omnia divina humanaque bona. Aristoteli ὁ μεγαλόψυχος παῤῥησιαστικὸς καὶ ἀληθευτικὸς, *magnanimus verum et libere loqui amat.* Plutarcho τὸ ψεύδεσθαι δουλο-
Lib. i. *init.* πρεπὲς, [y]*servile mentiri.* Arrianus de Ptolemæo: καὶ αὐτῷ βασιλεῖ ὄντι αἰσχρότερον ἢ τῷ ἄλλῳ ψεύσασθαι ἦν· *et ipsi, utpote regi, turpius mentiri quam alii cuivis.* Apud eun-
Lib. vii. 5. dem Alexander: οὐ χρῆναι τὸν βασιλέα ἄλλο τι ἢ ἀληθεύειν

[8] Vox illa, *semper*, apud Ælianum non legitur. *J. B.*

[y] *Servile mentiri*] Philo libro: omnem virum probum esse liberum: (pag. 888 B.) παρ' ὃ καὶ τοὺς διχόνους καὶ δολεροὺς ἅπασιν ὀνομάζειν ἔθος ἀνελευθέρους τε καὶ δουλοπρεπεῖς· *unde et eos qui duplices sunt atque fallaces,*

former discussion concerning oaths, whether assertory or promissory; that they have force to exclude all exceptions which may be taken on account of the person with whom we are dealing: since in these, we have to do, not with men only, but with God also, and are bound by our oath to him, although there should no right accrue to any man. And we have there said also, that in an oath, it is not as in other discourse, that to excuse us from the guilt of a lie, unusual interpretations of words may be admitted; but that by all means truth is required in that sense which the hearer is in good faith conceived to understand: so that we must detest the impiety of those who say that men are to be deceived with oaths as boys with toys.

XX. 1 We know that some of the kinds of fraud which we have said are allowed by Natural Law, have been repudiated by some people, or some individuals. But that does not proceed from an opinion that such frauds are iniquitous, but from a certain eminent

πρὸς τοὺς ὑπηκόους· *non debere regem apud subditos aliud quam verum eloqui.* Mamertinus de Juliano: *mira est in principe nostro mentis linguæque concordia. Non modo humilis et parvi animi, sed et servile vitium scit esse mendacium: et vere cum mendaces homines aut inopia aut timor faciat, magnitudinem fortunæ suæ imperator qui mentitur ignorat.* Laudatur Plutarcho Aristidis φύσις ἱδρυμένη ἐν ἤθει βεβαίῳ καὶ πρὸς τὸ δίκαιον ἀτενὴς, ψεῦδος δ' οὐδ' ἐν παιδιᾶς τινι τρόπῳ προσιεμένη· *ingenium morum constantia præditum, et justi tenax, mendacii etiam in joco fugiens.* De Epaminonda Probus: *adeo veritatis diligens, ut ne joco quidem mentiretur.*

Paneg. Jul. c. 20.

Pag. 319 D.

Corn. Nep. c. 3.

2 Quod profecto Christianis eo magis observandum est, [9]quia ipsis non simplicitas tantum imperata est Matth. x. 16, sed et vaniloquentia interdicta Matth. xii. 36, et is in exemplum propositus, in cujus ore dolus inventus non est. Lactantius: *Itaque viator ille verus ac justus non dicet illud Lucilianum:*

1 Pet. ii. 22.

Inst. Div. vi. 18.

Homini amico ac familiari non est mentiri meum.

Sed etiam inimico atque ignoto existimabit non esse mentiri suum: nec aliquando committet, ut lingua interpres animi a sensu et cogitatione discordet. Talis est in *Philoctete* Sophoclis Neoptolemus ὑπερβάλλων ἁπλότητι καὶ εὐγενείᾳ,

eos illiberales servilisque animi vocare solent. [Locus Plutarchi exstat in Lib. *De Educ. Liber.* pag. 11 c. *Edit. Wechel.* Tom. II. *J. B.*]

[9] Nihil heic poscit Religio Christiana ultra id, quod Lege Naturæ sancitur. Diximus plura in Notis nostris Gallicis. *J. B.*

loftiness of mind, and sometimes from a confidence in the strength of the speaker. In Elian we have a saying of Pythagoras, that men approach to the gods principally by two things; by always speaking the truth, and by doing good to others; and in Jamblichus veracity is called the leader to all divine and human good things. So Aristotle says that the *magnanimous man loves to speak truly and freely;* Plutarch, that *to lie is slavish.* So Arrian of Ptolemy and of Alexander; Mamertinus of Julian; so Plutarch of Aristides, and Probus of Epaminondas, that they would not lie even in jest.

2 And this is still more to be observed by Christians, to whom not only simplicity is commanded, Matt. x. 16, but also vain speaking interdicted, Matt. xii. 36; and he proposed as an example, in whose mouth was found no guile. So Lactantius says that we must not be content with telling truth to our friends, but also to strangers and enemies. So Neoptolemus is described in Sophocles,

Orat. lii. p. 552 c. *generosa simplicitate excellens,* ut recte notavit Dion Prusæensis, qui Ulyssi ad dolos hortanti sic respondet. (*Philoctet.* vers. 85, et seqq.):

Ego audiens quæ doleo, Laërta sate,
Implere factis oderim multo magis:
Nam si nec ego sum natus ut fallacias
Secter [z] nec olim genitor, ut perhibent, meus:
At sum paratus vi mera, non fraudibus
Pertrahere raptum.

Euripides *Rheso* (vers. 510, 511):

Generosus animus hostibus furtim necem
Inferre nescit.

Plut. *Alex.* p. 683 D. Lib. xiii. 1. 3 Sic Alexander furari negabat se velle victoriam. Et Achæos abhorruisse ab omni in hostes fraude narrat Polybius, ideo quod eam demum firmam censerent victoriam, quæ, ut *In VI. Cons. Hon.* v. 248. Claudiani verbis sensum ejus exprimam,

Confessos animo quoque subjugat hostes.

Tales Romani ferme ad usque belli Punici secundi finem. *Var. Hist.* xii. 33. Ælianus: *ἴσασι Ῥωμαῖοι ἀγαθοὶ εἶναι, καὶ οὐ μὲν διὰ τέχνης καὶ ἐπιβουλῆς καταγωνίσασθαι τοὺς ἐχθρούς· Romanis propria est virtus, non per astus et vafritiem quæsita victoria.*

z *Nec olim genitor, ut prohibent, meus*] Achilles: de quo Horatius *Carminum* Lib. IV. ode vi. (vers. 13, *et seqq.*):

Ille non inclusus equo Minervæ
Sacra mentito, male feriatos
Troas et lætam Priami choreis
Falleret aulam:
Sed palam captis gravis.

Et quæ sequuntur: ubi Scholiastes dicit *Achillem nihil fraude, sed semper palam virtutis fiducia dimicasse.* Nota illud

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excellent in simplicity and noblemindedness; as Dio Prusæensis notes. See his answer to Ulysses in the *Philoctetes,* and Euripides in the *Rhesus.*

3 So Alexander said that he would not steal a victory. And Polybius relates that the Achæans abhorred all fraud towards enemies; thinking victory then only firm when, as Claudian says, it subjugates the minds of the enemy. Such were the Romans till the end of the second Punic war. It is their virtue, Elian says, not to seek victory by art and cunning. And accordingly when Perseus was deceived with the hope of peace, the older senators said that they did not recognize the arts of Rome; that their ancestors had never in war boasted of cunning instead of courage; not of the tricks of the Carthaginians, not of the subtlety of the Greeks, among whom it was more glorious to deceive an enemy than to overcome him by force. And then they added that sometimes, for the

Unde cum Perseus Macedonum rex deceptus esset spe pacis, negabant veteres senatorum se agnoscere Romanas artes: majores nunquam ut astu magis quam virtute gloriarentur bella gessisse: non versutiis Punicis, non calliditate Græca, apud quos fallere hostem quam vi superare gloriosius foret. Tum illud addebant: *interdum in præsens tempus plus profici dolo quam virtute, sed ejus demum animum in perpetuum vinci, cui confessio expressa esset, se neque arte, neque casu, sed collatis cominus viribus justo ac pio bello esse superatum.* Etiam serius apud Tacitum legimus: *non fraude, neque occulte, sed palam et armatum populum Romanum hostes suos ulcisci.* Tales etiam Tibareni, qui prælii quoque locum et tempus condicebant. Quod et de Græcis sui temporis apud Herodotum [1] prodit Mardonius.

[[Liv. xlii. 47.]]

Ann. ii. 88.

Schol. ad ii. *Apoll. Rhod.* v. 1012.

XXI. Ad modum agendi et illud pertinet, quod [a] quicquid alicui facere non licet, ad id eum impellere aut sollicitare non liceat. Pro exemplo sint hæc: regem suum occidere subdito non licet, nec oppida sine consilio publico dedere, nec spoliare cives. Ad hæc ergo subditum, qui talis maneat, permovere non licet. Semper enim qui alteri peccandi causam dat, peccat et ipse. Nec est quod regerat quisquam, ipsi qui

virtutis fiducia, quod optime convenit cum iis quæ nos hujus paragraphi initio in textu diximus.

[1] Locus est Lib. VII. cap. 9. Sed ubi id reperit Auctor noster, quod verba Græca, recte expensa, non præ se ferunt. *J. B.*

[a] *Quidquid alicui facere non licet, ad id eum impellere aut sollicitare non liceat*] Ita docet et Maimonides in הלכות חובל cap. 5. § 10.

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present moment, success might be obtained by deceit more than by valour; but that his mind only was thoroughly conquered, who was compelled to confess that he was subdued, not by art or by chance, but in a close trial of strength in a just and pious war. So even later in Tacitus. Such too were the Tibarenians, who announced beforehand the time and place of battle. And Mardonius in Herodotus says that the Greeks of his time did the same.

XXI. As to what concerns the mode of acting, this is to be noted; that what it is not lawful for another to do, it is not lawful for us to impel or solicit him to do. We may take such examples as these: it is not lawful for a subject to kill his king, nor to give up towns without public authority, nor to despoil his fellow-citizens. Therefore it is not lawful to move a citizen, continuing in that character, to do such things. For in all cases, he who gives another cause to sin, does himself sin. Nor is it enough to reply

talem hominem ad facinus impellit, actum talem, puta hostis interfectionem, esse licitum. Licet enim id ei facere, sed non eo modo. Bene Augustinus: *nihil interest utrum ipse scelus admittas, an alium propter te admittere velis.*

Lib. ii. *De Mor. Eccl. Cath.* c. 57.

XXII. Aliud est si quis opera sponte nec suo impulsu peccantis ad rem sibi licitam utatur: quod iniquum non esse [b] Dei ipsius exemplo alibi probavimus. *Transfugam jure belli recipimus,* inquit Celsus, id est, [c] contra jus belli non est, ut eum admittamus, qui deserta hostium parte nostram eligit.

L. 51. *D. de acq. rerum dom.*

[b] *Dei ipsius exemplo*] Libro II. cap. xxvi. § 5.

[c] *Contra jus belli non est, ut eum admittamus qui deserta hostium parte nostram eligit*] Neque reddendi tales, nisi pace convenerit: ut pace cum Philippo, Ætolis, Antiocho. Polybius in *Excerptis Legationum* IX. XXVIII. XXXV. *Menander protector* idem nos docet. (Pag. 118. *Edit. Hœsch.* in conditionibus Fœderis inter Justinianum et Chosroën. *J. B.*)

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that to him who impels such a man to such a deed, say to kill an enemy, the deed is lawful. It is lawful, but not in that manner. Augustine says well, *It makes no difference whether you yourself commit a wickedness, or make another man commit it for you.*

XXII. The case is different, if any one use the help of a person who does wrong of his own accord, and not at his impulse; which we have proved elsewhere, by the example of God himself, not to be unjust. *We receive a deserter by the laws of war,* says Celsus; that is, it is not against the laws of war to receive him who leaves the enemy and comes over to us.

CAPUT II.

QUOMODO JURE GENTIUM BONA SUBDITORUM PRO DEBITO IMPERANTIUM OBLIGENTUR: UBI DE REPRESSALIIS.

I. 1 VENIAMUS ad ea quæ ex jure descendunt gentium. Ea partim ad quodvis bellum spectant, partim ad certam belli speciem. A generalibus auspicemur. Mero naturæ jure ex facto alieno nemo tenetur, nisi qui bonorum successor est: [a]ut enim cum oneribus bona transirent simul cum dominiis rerum introductum est. Imperator Zeno æquitati naturali contrarium dicit ut pro alienis debitis alii molestentur. Hinc tituli in jure Romano, ne uxor pro marito, ne maritus pro uxore, ne filius pro patre, ne pater vel mater pro filio conveniantur.

L. un. C. ut null. ex vic.

Tot. tit. C. ne uxor pro mar. et ne fil. pro pat.

[a] *Ut enim cum oneribus bona transirent simul cum dominiis rerum introductum est*] Vide supra Lib. II. c. 21. § 19. Adde c. in literis 5. *de raptoribus* c. tua 9. de usuris.

Chapter II. *How by the Law of Nations the goods of Subjects are liable for the debt of the Rulers; and herein, of Reprisals.*

I. 1 Let us come to the results which in war flow from the Law of Nations. These belong partly to any war, partly, to certain kinds of war. We begin with the general case.

By the mere Law of Nature, no one is bound by the act of another, except he who is the successor to his property: for the rule that property passes with its burthens, was introduced when property was introduced. The emperor Zeno says that it is contrary to natural equity that one person should be molested for the debts of another. Hence the Roman Law provides that the wife is not responsible for the husband, the husband for the wife, the son for the father, the father or mother for the son.

2 Nec quod universitas debet, singuli debent, ut diserte loquitur Ulpianus: nimirum si universitas bona habeat: alioqui enim tenentur non ut singuli, sed qua pars sunt universorum. Seneca: *si quis patriæ meæ pecuniam credat, non dicam me illius debitorem, nec hoc æs alienum profitebor:* [b]*ad exsolvendum tamen hoc portionem meam dabo.* Supra dixerat: *unus e populo non tanquam pro me solvam, sed tanquam pro patria conferam.* Et: *singuli debebunt non tanquam proprium, sed tanquam publici partem.* Hinc speciatim jure Romano constitutum, ut nullus ex vicanis pro alienis vicanorum debitis teneatur; et alibi nulla possessio alterius pro alienis debitis etiam publicis conveniri præcipitur: et in novella Justiniani vetantur ἐνεχυριασμοὶ, id est, [c]pignorationes pro aliis, addita causa, quod rationem non habeat, alium quidem esse debitorem, alium vero exigi; ubi et hujusmodi exactiones odiosæ vocantur. Et rex Theodoricus apud Cassiodorum fœdam vocat licentiam alterum pro altero pignorandi.

L. 7. § 1. D. qu. cuj. univ. nom. — *Lib. vi. de Benef. c. 20.* — *Cap. 19. ib.* — *D. l. un. C. ut null. ex vit. xi. 56. L. 4. C. de exec. et exact. xii.* — *Nov. 52. et 134. c. 7.* — *Lib. iv. Var. Epist. 10.*

II. 1 Hæc quanquam vera sunt, tamen jure gentium voluntario induci potuit, et inductum apparet, [1]ut pro eo quod

[b] *Ad exsolvendum tamen hoc portionem meam dabo*] Vide *leges Siculas* fine libri I. (Tit. 100.)

[c] *Pignorationes*] C. unico *de injuriis* in sexto: *pignorationes quas vulgaris elocutio repressalias nominat.* Rectius scribas, ut libri quidam, *reprensalias.* Id enim voci Saxonicæ Wither-

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2 Nor do individuals owe what the general body owes, as Ulpian plainly says: that is, if the general body have property; for otherwise, they are bound, not as individuals, but as parts of the general body. Seneca says, *If any one lends money to my country, the debt is not mine: but I will give my share towards the payment.* He had before said, *individuals will owe, not as a part of their own debt, but a part of the public.* Hence it was specially provided by the Roman Law that the members of a village should not be responsible for the debts of others of the same village; and elsewhere, no possession can be made responsible for other persons' debts, not even public debts. And in a law of Justinian, securities for others are forbidden; it being stated as the reason, that the debtor is one person, and the person distrained, another, which is stated to be unreasonable and odious. And so king Theodoric calls this liberty of suretyship disgraceful.

II. 1 But though this is so, a rule may be introduced by the instituted Law of Nations, and it appears, has been introduced, that for a debt due from any civil society or its head, either on his own

debet præstare civilis aliqua societas, aut ejus caput, sive per se primo, sive quod alieno debito jus non reddendo se quoque obstrinxerit, pro eo teneantur et obligata sint bona omnia corporalia et incorporalia eorum qui tali societati aut capiti subsunt. Expressit autem hoc quædam necessitas, quod alioqui magna daretur injuriis faciendis licentia, cum bona imperantium sæpe non tam facile possint in manus venire, quam privatorum qui plures sunt. Est igitur hoc inter jura illa quæ Justinianus ait usu exigente, et humanis necessitatibus a gentibus humanis constituta. *Inst. de Jur. Nat.* § 2.

2 Non autem hoc naturæ repugnat, ut non more et tacito consensu induci potuerit, cum et fidejussores sine ulla causa ex solo consensu obligentur. Et spes erat facilius membra ejusdem societatis a se mutuo jus consequi posse, et indemnitati suæ consulere, quam externos, quorum multis in locis exigua habetur ratio: deinde, commodum ex hac obligatione commune erat omnibus populis, ita ut qui nunc eo gravaretur, alio tempore indidem sublevari posset. Thom. 2, 2. q. 40. art. 1. Molin. *disp.* 120. et 121. Valent. *disp.* 3. q. 16. *num.* 3. Navar. c. 27. n. 136.

3 Receptum autem hunc morem, non tantum apparet [d] ex bellis plenis quæ populi populis inferunt: in his enim quid

namii ad amussim respondet, sed usus alterum recepit.

[1] Hoc non oritur ex jure illo Gentium voluntario, quod gratis statuitur, sed ex ipsa constitutione Societatis Civilis, ut ostendimus in Notis nostris Gallicis. *J. B.*

[d] *Ex bellis plenis*] Distinguit bella

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account or as bound for another, all the goods, corporeal and incorporeal, of the members of the society, are bound and liable. And this rule has been established by a certain necessity, in that otherwise there would be great licence for the commission of injury, since the goods of the rulers often cannot so easily be got at, as those of private persons, who are more numerous. And therefore this is one of the rights which, Justinian says, were instituted by nations on the exigency of usage and to meet human necessities.

2 And this is not in any way so repugnant to nature that it may not be introduced by usage and tacit consent, since sureties become bound for debts without any cause, by consent alone. And it was to be hoped that the members of the same society would be able to exact rights from one another, and to consult their own indemnity more easily than strangers, who in many cases are little attended to: and moreover there was by such an obligation an advantage to be gained by all peoples, so that they upon whom in one case it presses heavily, in another would find their relief in it.

3 That this usage is received, appears not only from the wars on

Liv. i. 32. observetur, ostendunt denuntiationum formulæ: *populis priscorum Latinorum, hominibusque priscis Latinis bellum indico facioque:* et in rogatione: *vellent, juberent, Philippo regi Macedonibusque qui sub regno ejus essent bellum indici:* et in decreto ipso: *populus Romanus cum populo Hermundulo hominibusque Hermundulis bellum jussit,* quod ex Cincio est in re militari: et alibi: *hostis sit ille quique intra præsidia ejus sunt:* verum etiam ubi ad eam belli plenitudinem nondum ventum est, sed tamen violenta quadam juris executione, id est, bello imperfecto, opus est, idem videmus usurpari. Pharnabazo regis Persarum subdito dicebat olim Agesilaus: *ἡμεῖς, ὦ Φαρνάβαζε, καὶ φίλοι ὄντες πρότερον βασιλέως, ἐχρώμεθα τοῖς ἐκείνου πράγμασι φιλικῶς. καὶ νῦν πολέμιοι γεγονότες, πολεμικῶς· ἐν οὖν καί σε τῶν βασιλέως κτημάτων ὁρῶντες εἶναι βουλόμενον, εἰκότως διὰ σοῦ βλάπτομεν ἐκεῖνον· Nos Pharnabaze et cum amici regis essemus amice nos erga ea quæ ipsius erant gerebamus: et nunc, cum hostes simus facti, hostiliter nos gerimus. Quare cum et tu esse velis inter ea quæ regis sunt, jure per te illum lædimus.*

Lib. xxxi. 6. Gell. xvi. 4. Liv. xxxviii. 48. *et alibi.* Plut. *Ages.* p. 602 D, E. et Xen. *Hist. Gr.* iv. 1. § 15.

III. 1 Ejus quam dico executionis species erat quam

ab his pignorationibus vir prudens Nicolaus Damascenus, ubi ostendit Herodi, cui non licebat bellum inferre Arabi, licuisse *ῥύσια λαμβάνειν*, pro sibi ex contractu debitis uti pignoratione. Josephus XVI. *Antiquæ Historiæ*, ubi hæc verba: *τὸ δάνειον εἰπὼν τῶν πεντακοσίων ταλάντων, καὶ τὴν συγγραφὴν ἐν ᾗ καὶ τοῦτο ἦν προσγεγραμμένον, ἐξεῖναι τῆς προθεσμίας παρελθούσης ῥύσια*

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a large scale which one people carries on against another: for in these the rule that is followed appears in the formulæ by which war is declared; as in Livy, *I declare war against the people of the Latins and against the Latian men:* and in the proposal, *Whether they wished that war should be declared against Philip of Macedon and those who are under his rule:* and in the decree itself, *The Roman people order that war should be with the Hermundulan people, and with the Hermundulan men:* in Cincius on military affairs, and elsewhere, *Let him be an enemy and those who are under his protection:* but also, when war on this full scale has not yet taken place, but where some violent exaction of rights, that is, an imperfect war, has been found necessary, we see the same usage prevail. Agesilaus said to Pharnabazus, *When we were friends to the king we behaved in a friendly manner to his people: and now that we are enemies, we shall behave hostilely to the same: and therefore as you choose to belong to the king, we shall attack him through you.*

III. 1 A kind of the exaction of rights of which we speak was

Athenienses vocabant ἀνδροληψίαν, de qua sic habebat lex Attica: ἐάν τις βιαίῳ θανάτῳ ἀποθάνῃ, ὑπὲρ τούτου τοῖς προσήκουσιν εἶναι τὰς ἀνδροληψίας, ἕως ἂν ἢ δίκας τοῦ φόνου ὑπόσχωσιν, ἢ τοὺς ἀποκτείναντας ἐκδῶσι. τὴν δὲ ἀνδροληψίαν εἶναι μέχρι τριῶν, πλέον δὲ μή· id est, *si quis morte per vim illata obierit, pro eo proximis ac necessariis jus esto homines prehendendi, donec aut pœna sumatur de cæde aut homicidæ dedantur: liceat autem tres tantum homines prehendere, non ultra.* Hic videmus pro debito civitatis, quæ obligatur subditos suos qui aliis nocuerunt plectere, obligari jus quoddam incorporale subditorum, ipsam scilicet libertatem morandi ubi velint, et agendi quod velint, ita ut in servitute interim sint, donec civitas id faciat quod facere tenetur, id est, puniat sontem. Quanquam enim Ægyptii, ut ex Diodoro Siculo discimus, disputabant corpus sive libertatem pro debito obligari non debere, nihil tamen in eo est naturæ repugnans, et mos non Græcorum tantum, sed et aliarum gentium in contrarium valuit.

[Apud Dem. *Or. adv. Aristoc.* p. 440 c [[647, 24, § 82, *ed. Bekker.*]]]

[*Bibl.* i. 79.]

2 Aristocrates Demostheni coævus decretum rogaverat, si quis Charidemum occidisset, eum abripere undecunque liceret, et si quis obsisteret, is hostium esset numero. Hic multa re-

λαμβάνειν ἐξ ἁπάσης τῆς χώρας, τὴν μὲν στρατιὰν οὐ στρατιὰν ἔλεγεν, ἀλλ' ἐπὶ δικαίων τῶν ἰδίων ἀπαίτησιν· *cum narrasset quingenta Herodi talenta debita, cautionemque de iis expositam id continere ubi dies præstituta transiisset, posse ipsum ex omni Arabum terra pignora capere, hanc expeditionem non expeditionem esse dicebat, sed justam debiti exactionem.* (Cap. x. § 8. *division. Hudson.*)

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what the Athenians called *androlepsy*, or man-taking; and the Attic law was, that *if any one was violently killed, his neighbours and relatives had the right of taking men till either the murderer was punished, or the murderers given up; but three men only may be taken, and not more.* Here we see that for a debt of the city which is under an obligation to punish those of its subjects who have injured others, a certain incorporeal right of the subjects is held bound, namely, their personal liberty; so that they are enslaved till the city punishes the guilty. The Egyptians, as we learn from Diodorus, held that a man's body or liberty were not to be bound for a debt: but yet there is nothing in such a usage repugnant to nature: and the contrary practice has prevailed not only among the Greeks, but also other nations.

2 Aristocrates, a contemporary of Demosthenes, had proposed a decree that if any one slew Charidemus, he might be taken wherever he was, and if any one resisted he should be held as an enemy. In

prehendit Demosthenes: primum quod non distinxerit Aristocrates inter cædem justam et injustam, cum et justa aliqua esse possit: deinde quod non exigit, ut prius postuletur judicium: præterea quod non eos, apud quos facta sit cædes, sed
Ubi supra. eos qui homicidam recipiunt teneri velit. Verba Demosthenis sunt: *ὁ μὲν νόμος, ἂν μήτε δίκας ὑπόσχωσι παρ' οἷς ἂν τὸ πάθος γένηται, μήτε τοὺς δεδρακότας ἐκδίδωσι, κελεύει κατὰ τούτων εἶναι τὸ ἀνδρολήψιον κατὰ* ⟦*μέχρι ed. Bekk.*⟧ *τριῶν. ὁ δὲ τούτους μὲν ἀθῴους παρῆκε, καὶ οὐδὲ λόγον πεποίηται περὶ αὐτῶν οὐδένα, τοὺς δὲ τὸν ἤδη πεφευγότα, φήσω γὰρ οὕτω, κατὰ τὸν κοινὸν ἀνθρώπων νόμον, ὃς κεῖται τὸν φεύγοντα δέχεσθαι,* ⟦*τοὺς*⟧ *ὑποδεξαμένους ἐκσπόνδους εἶναι γράφει, ἐὰν μὴ τὸν ἱκέτην* (male editur [2]*οἰκέτην*) *ἔκδοτον διδῶσιν·* *Lex, si apud quos cædes evenit neque jus reddant, neque sontes dedant, adversus eos dat trium hominum prehensionem. At hic hos quidem relinquit intactos, ac ne mentionem quidem eorum facit. At eos qui jam fuga elapsum, ita enim rem ponam, susceperunt secundum jus omnium hominum quod fugientes vult posse suscipi, hos vult esse hostium loco ni supplicem dedant.* Quarta reprehensio est quod Aristocrates rem statim ad plenum bellum deducit, cum lex prehensione contenta sit.

3 Ex his primúm illud et secundum et quartum ratione non caret. At tertium illud, nisi ad solum eventum cædis casu aut ob sui tutelam factæ restringatur, non est ut non

[2] Ita diserte habet ultima Editio Hieronymi Wolfii, Basil. 1572. qua utor. Sed nonnulla alia Auctor heic emendat tacite, idque non sine caussa,

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this, Demosthenes finds much to reprehend; first, that Aristocrates had not distinguished between killing justly and unjustly, though it might happen that he was killed justly: and next, that he does not require that first a trial should be demanded: and thirdly, that he requires those to be bound who have received the homicide, and not those among whom the act was committed. And he then refers to the *androlepsy* just mentioned, saying that *The law made them responsible among whom the homicide took place; but that Andronicus left these untouched, and punished those who received the homicide; though the usage of all nations was to protect refugees.* The fourth objection is, that Aristocrates makes the matter forthwith a case of public war, the law being content with the man-taking.

3 Of these, the first, second, and fourth arguments are not without weight. But as to the third, except it be unrestricted to the case of

oratorie magis et argumenti causa, quam ex vero et jure sit dictum. Nam jus gentium ut supplices suscipiantur et defendantur, ut supra diximus, ad eos tantum, quibus fortuna, non crimen obstat, pertinet. Lib. ii. xxi. § 7.

4 Ceteroqui par jus est eorum apud quos crimen est factum, et eorum qui sontem punire aut dedere recusant. Atque adeo aut illa ipsa lex, qua utitur Demosthenes, interpretationem eam quam dico ex usu recepit, aut adversus cavillationes tales expressius postea est posita: horum enim alterum quin sit, non negabit, qui attenderit ad illud Julii Pollucis: ἀνδρολήψιον δὲ ὅταν τις τοὺς ἀνδροφόνους καταφυγόντας ὥς τινας ἀπαιτῶν μὴ λαμβάνῃ, ἔξεστιν ἐκ τῶν οὐκ ἐκδιδόντων ἄχρι τῶν τριῶν ἀπαγαγεῖν· *hominum prehensio est, quoties quis homicidas qui ad aliquos confugerunt non recipet cum id postulaverit. Nam jus est tres homines prehendendi adversus eos qui dedere recusant.* Nec aliter Harpocration: ἀνδροληψία, τὸ ἁρπάζειν ἄνδρας ἐκ τινὸς πόλεως. ἐνεχύραζον γὰρ τὴν ἔχουσαν πόλιν τὸν ἀνδροφόνον, καὶ μὴ προϊεμένην αὐτὸν εἰς τιμωρίαν· *Jus hominum prehensionis est jus rapiendi aliquos ex urbe aliqua. Nam in eam civitatem, quæ homicidam teneret, nec pœnæ dederet, pignoratione utebantur.* Lib. viii. 6. § 50. Voc. Ἀνδροληψία.

5 Simile huic est quod ad recuperandum civem injuria manifesta captum, civitatis apud quam id factum est cives retinentur. Sic Carthagine quidam impedierunt, ne Ariston Liv. xxxiv. 61.

meo quidem judicio. Potuisset etiam, pro φήσω γὰρ οὕτω, scribere θήσω γὰρ οὕτω, ut est in MSS. bonæ notæ, et in quadam Editione: quum præsertim ipse vertat: *Ita enim rem* PONAM. *J. B.*

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slaying by accident or in self-defense, is said rather oratorically than according to truth and justice: for the law of nations that suppliants are to be received and defended, applies to those, as we have said, who have been unfortunate, not criminal.

4 Moreover the case is the same as to those among whom the crime was committed, and those who refuse to punish or to give up the guilty person. And therefore the law which Demosthenes quotes either receives from usage that interpretation which I have given, or was afterwards expressly made against such evasions. That one of these two was the case will not be denied by any one who attends to what is said by Julius Pollux of this androlepsy, referring it to those who receive the homicide. So Harpocration on androlepsy.

5 A like practice it is, when, to recover a citizen made captive by

Tyrius caperetur, hac addita causa: *idem Carthaginiensibus et Tyri et in aliis emporiis, in quæ frequenter commeent, eventurum.*

IV. Alia executionis violentæ species est ἐνεχυριασμὸς sive [e]*pignoratio inter populos diversos*, quod jus repressaliarum vocant recentiores jurisconsulti, Saxones et Angli Withernamium, et Galli etiam, ubi a rege impetrari id solet, literas Marcæ. Locum autem habet, ut aiunt jurisconsulti, ubi jus denegatur.

Bal. iii. *cons.* 58. Bart. *de Repress.* q. 5. *ad tert.* n. 9.

V. 1 Quod fieri intelligitur, non tantum si in sontem aut debitorem judicium intra tempus idoneum obtineri nequeat, verum etiam si in re minime dubia (nam in dubia re præsumtio est pro his qui ad judicia publice electi sunt) plane contra jus judicatum sit: nam auctoritas judicantis non idem in exteros, quod in subditos valet. Etiam inter subditos non tollit quod vere debebatur. *Verus debitor, licet absolutus sit,*

[e] *Pignoratio inter populos diversos*] Σύλας id dicit Demosthenes in *Oratione pro Corona*, et Aristoteles *Œconomicon* secundo. [pag. 503 c. Sed locus Demosthenis non extat, quod quidem sciam, in nobili illa et longa Oratione *pro Corona*, verum in brevi Oratione Περὶ τοῦ στεφάνου τῆς τριηραρχίας pag. 717 a [[p. 1232, 4]] quam laudat Harpocration, voce Σύλας: unde sine dubio natus error Auctoris. *J. B.*]

[f] *Natura tamen debitor permanet*] Spectant huc quæ habet Gailius *de Pace Publica* Lib. ii. cap. viii. num. 7. et Vasquius libro iv. controversiarum illustrium cap. x. § 41.

[g] *Corpora*] Vide exemplum apud Ammianum libro xvii. ubi Julianus Francorum quosdam retinet usque dum captivi ex pacto liberentur. Adde quæ

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manifest wrong, citizens of the state by which this has been done are detained. Thus at Carthage some interfered to prevent Aristo of Tyre being taken, saying that if this was done, *the same would be done to Carthaginians at Tyre, and in other mercantile cities whither they went in numbers.*

IV. Another kind of the violent exaction of rights is taking security of the people of the offender; which the more recent jurists call the *Right of Reprisals;* the Saxons and Angles, *Withernamium;* and the French, among whom it is granted by the king, *Letters of Marque.* And this has place, as the jurists say, when Rights are denied.

V. 1 This is understood to be permitted by custom, not only if judgment against a criminal or a debtor cannot be obtained within a reasonable time; but also in a very clear case, (for in a doubtful case the presumption is for the established judges,) if judgment be given plainly against right. Even among subjects a wrong sentence does not abolish a true debt. *A true debtor though absolved remains a debtor,* says Paulus. And when by the wrong doing of the judge the

[f]*natura tamen debitor permanet:* inquit Paulus jurisconsultus: *Et cum per injuriam judicis domino rem quæ debitoris non fuisset abstulisset creditor quasi obligatam sibi, et quæreretur, an soluto debito restitui eam oporteret debitori, Scævola restituendam probavit.* Hoc interest, quod subditi executionem etiam injustæ sententiæ vi impedire, aut contra eam jus suum vi exsequi licite non possunt, ob imperii in ipsos efficaciam: exteri autem jus habent cogendi, sed quo uti non liceat quamdiu per judicium suum possint obtinere.

L. 60. D. de cond. indeb. *L. 12. § 1. D. de distra. pign.* *Inn. et Pan. in c. quia plerique de immu. ecc.* Soto, l. iii. q. 4. art. 5.

2 Tali igitur de causa aut [g]corpora, aut res mobiles subditorum ejus qui jus non reddit capi posse, non quidem natura introductum est, sed moribus passim receptum. Vetustissimum exemplum est apud Homerum Iliados λ [v. 674], ubi Nestor narratur ob ereptos patri equos Elidensium pecora et armenta cepisse [h]ῥύσι' ἐλαυνόμενος, ut Poëta loquitur, ubi ῥύσια interpretatur Eustathius τὰ ἀντὶ τινῶν ῥυόμενα, ὅ

Jac. *de Can. Anch. Domin. Franc. in c.* 1. *de injur. in 6.* Fulg. et Salic. *in authent. Omnino C. de act. et obl.* Jac. *de Bell. visu in Auth. Ut non fiant pignora.* Silv. *in verb. repress.* Bart. *in tract. de repress.* Guid. *Guido Papa* q. 32. Gail. *de pign. obs.* 1. n. 5. Vict. *de Jure bell.* n. 41. Covar. *c. pec.* p. 11. § 9. n. 4.

habet *Leo Afer* Lib. III. (pag. 435 *Ed. Elzevir.* 1632.) de Monte *Beni gualid.* [Auctor ex Ammiano nobis proponit Francos, pro Alemannis. Deinde hi tamquam obsides retenti: adeoque alio pertinet exemplum. Vide cap. 2. dicti Libri XVII. pag. 189. *Edit. Vales. Gron.* ubi res narratur. *J. B.*]

[h] Ῥύσι' ἐλαυνόμενος] Hoc sensu ῥύσια invenias excerptis legationum ex Polybio XXXVIII. ubi de Achæis contra Bœotos; et excerpto CXXIII. ῥυσιάζειν apud Diodorum Siculum excerptis manuscripti Peiresiani. [Ubi τὴν πόλιν, scilicet Lacedæmona, ῥυσιάζειν, dicitur Polychares Messenius: pag. 229.] Alibi vero ῥύσια καταγγέλλειν in bello usurpatur, ut dicemus mox capite III. § 7. sunt enim hæc valde affinia.

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creditor takes a thing which was not the property of the debtor, as being liable; and when it was inquired *if when the debt was paid this ought to be restored to the debtor, Scævola decided that it was.* There is this difference [between a question among subjects of the same state and a question with foreigners], that the subjects of the same state cannot lawfully impede by force the execution even of an unjust sentence, on account of the authority of the law over them; but foreigners have the right of compelling: a right however which they may not lawfully use, so long as they can obtain by judgment what is their own.

2 The rule then that, for such a cause, either the bodies or the moveables of the subjects of him who does not grant me justice, may be taken by me, is not indeed introduced by nature, but is everywhere received as usage. The oldest example is in Homer, where Nestor says that he took the flocks and herds of the Elidians as reprisals for his father's horses. He goes on to say that he summoned all those to help him who had any debts owing from the Elidians. There is another

ἐστιν ἑλκόμενα καὶ ἀντὶ τῶν προαρπασθέντων ἁρπαζόμενα· Sequitur deinde in narratione, convocari edicto ad jus suum persequendum omnes eos quibus aliquid ab Elidensibus v. 704. debebatur, nimirum,

Μή τις οἱ ἀτεμβόμενος κίοι ἴσης.
Ne quis justa sibi parte careret.

Aliud exemplum est in historia Romana de Romanorum navibus, Liv. ii. 34. quas pro bonis Tarquiniorum Cumis Aristodemus Tarquiniorum hæres retinuit. Famulos, jumenta, pecunias re- *Ant. Rom.* vii. 12. tenta dixit Halicarnassensis. Et apud Aristotelem *Œcono-* Pag. 503 c. [[p. 1347, ubi tamen Bekkerus, χαλχηδόνις, et σῦλον legit.]] *micon* secundo de decreto Carthaginiensium ad prehendendas exterorum naves, εἴ τις σύλαν ἔχει, ut ibi loquitur, *si quis jus prehendendi haberet.*

VI. Vita autem subditorum innocentium ut ex tali causa obligetur, forte creditum fuit apud aliquos populos, eo nimirum quod crederent unicuique hominum jus vitæ plenum esse in se, et id ad rempublicam potuisse transferri: quod minime esse probabile, nec saniori theologiæ consentaneum, [[Lib. II. c. 15, § 16, et c. 21, § 11.]] alibi diximus. Fieri tamen poterit, non ex intentione, sed ex accidenti, ut occidantur qui juris executionem per vim volunt impedire. Sed id si prævideatur, ex caritatis lege omittendam potius juris persecutionem [3] alibi ostendimus, cum ex ea

[3] Sed hac ratione jus istud plane inutile erit Christiano. Diximus in Notis nostris Gallicis. *J. B.*

[4] Quo sensu id verum sit, exposuimus etiam in iisdem Notis Gallicis. Ceteroquin postulat finis Societatis Ci-

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example in the Roman history, where Aristodemus, the heir of the Tarquins, detained the Roman ships at Cumæ, as security for the goods of the Tarquins. And Aristotle, in his *Œconomics,* mentions the decree of the Carthaginians for taking the ships of strangers *if any one has a claim.*

VI. That the life of innocent subjects should be held bound for such cause, was perhaps believed among ancient peoples; and on this ground, that they conceived that every man had a plenary right over his own life, and that this might be transferred to the state; but that this is not good doctrine nor agreeable to sound theology, we have elsewhere said. It may however take place, not intentionally, but by accident; as if they are killed who attempt to impede the exaction of rights. But if such a result be foreseen, by the law of charity the promotion of right is rather to be omitted, as we have elsewhere shewn; since by that law, the life of a man ought to be of more value to us, especially being Christians, than our goods.

VII. 1 In this matter, no less than in others, we are to distinguish

lege, Christianis præsertim, pluris esse debeat vita hominis quam res nostra, ut alibi demonstratum est. Lib. ii. cap. 1. §§ 12, et 13.

VII. 1 Ceterum non minus in hac materia quam in aliis cavendum est, ne confundamus ea quæ juris gentium sunt proprie, et ea quæ jure civili aut pactis populorum constituuntur.

2 Jure gentium subjacent pignorationi omnes subditi injuriam facientis, qui tales sunt ex causa permanente, sive indigenæ, sive advenæ: non qui transeundi aut moræ exiguæ causa alicubi sunt. Introductæ enim sunt pignorationes ad exemplum onerum, quæ pro exsolvendis debitis publicis inducuntur, quorum immunes sunt qui tantum pro tempore loci legibus subsunt. A numero tamen subditorum jure gentium excipiuntur legati, non ad hostes nostros missi, et res eorum. *Dec. cons.* 352. Bal. *l.* 3. *de Off. assess.*

3 At jure civili populorum sæpe excipi solent personæ mulierum et infantium; eorum vero qui literis operam dant et ad mercatus veniunt etiam res. Jure gentium singulis pignorandi [4]jus est, ut et Athenis ἐν ἀνδροληψίᾳ. Jure civili multorum locorum peti id solet alibi a potestate summa, alibi a judicibus. Jure gentium ipso facto dominium rerum captarum acquiritur ad summam debiti et sumtuum, [1]ita ut residuum reddi debeat. Jure civili solent citari quorum in-

vilis, ut jure illo privati non utantur absque concessione, expressa aut tacita, summi Imperantis. *J. B.*

[1] *Ita ut residuum reddi debeat*] Usi hac æquitate Veneti, captis in Galata Genuensium navibus, memorante Gre-

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what things are properly *juris gentium*, parts of the Law of Nations, and what is constituted by civil law or by compact.

2 By the Law of Nations, all the subjects of him who does an injury are liable to be security for satisfaction, being subjects from a permanent cause, whether indigenous or immigrants; but not they who are there in passing, or making a short stay. For such liability is introduced according to the example of the burthens which are laid on subjects for paying public debts: to which those are not liable who are subject to the laws of the place only for a time. From the subjects, are excepted, by the Law of Nations, ambassadors not sent to our enemies, and their property.

3 But by the civil or instituted Law of Nations, there are often excepted from this liability the persons of women and children; and the property of literary classes, and of merchants. By the Law of Nations any one may take surety for satisfaction, as in the *androlepsy* of the Athenians. By the instituted law of many places, such satisfaction is to be sought from the supreme authority; and in other

terest, postea [5]res publica auctoritate divendi aut addici iis quorum interest. Sed hæc atque alia peti debent ab his qui jura civilia tractant, et nominatim in hac materia a Bartolo, qui de repressaliis scripsit.

Æg. Regius de act. sup. disp. 13. dub. 7. n. 117.

4 Illud hic addam, quia ad juris hujus satis per se rigidi emollitionem pertinet, eos qui non solvendo quod debebant, aut jus non reddendo causam dederunt pignorationibus, ipso naturali ac divino jure [k]teneri ad resarcienda damna aliis, quibus eam ob causam aliquid decedit.

gora libro IX. ἀλλ' οὐδὲ τῶν ἀλισκομένων ἐκείνων νεῶν ἁπασῶν τοῦ πληρώματος ἐλυμήναντο τὸ παράπαν οὐδέν. ἦν γὰρ τὸ μὲν πλήρωμα σῖτος καὶ κριθή· τῶν δὲ ὄψων ταρίχη, ὁπόσα γεωργοῦσι λίμναι κωπαίδες τε καὶ μαιώτιδες, καὶ ποταμοὶ ταναΐδες. ἀλλὰ διετήρησαν εἰς τἀκριβὲς ἀλώβητα, ἕως ἀπολαβόντες τὸ χρέος, ἀπέδοσαν ἅπαντα· *sed neque de onere captarum a se navium corruperunt quicquam, onus erat frumentum et hordeum: ad hæc, salsamenta piscium qualia proferunt Copaides et Mæotides paludes, et Tanais flumina: sed ea servarunt anxie, nihil imminuta, donec recepto debito integra redderent.* (Pag. 189. *Ed. Genev.*)

[5] Addidi vocem illam *postea*, sine qua, aut simili, locum esse hiulcum, nemo non videt. *J. B.*

[k] *Teneri ad resarcienda damna*] Plutarchus in *Cimone* de Scyriis: οὐ βουλομένων τὰ χρήματα τῶν πολλῶν συνεκτίνειν, ἀλλὰ τοὺς ἔχοντας καὶ διηρπακότας ἀποδοῦναι κελευόντων· *Plerique pecunias contribuere nolebant, sed jubebant eos qui res alienas aut habebant aut rapuerant, sarcire damnum.* (Pag. 483 c.)

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places, from the judges. By the Law of Nations, the ownership of things taken is *ipso facto* acquired to the extent of the debt and expenses, the residue being to be returned. By instituted Law, they are to be cited who are concerned, and then their property sold or seized by public authority for the benefit of those who have a claim. Such and other rules are to be sought in those who treat of the Civil Law, and especially, in this matter, from Bartolus, who has written on Reprisals.

4 I will add, because it is a point which tends to the softening of the right of which we are speaking, which of itself is sufficiently harsh, that they who, by not paying what they owed, or by withholding any right, have given occasion for this seizure of securities, are, by Natural and Divine Law, bound to make good the loss to those who have thereby suffered.

CAPUT III.

DE BELLO JUSTO SIVE SOLENNI JURE GENTIUM, UBI DE INDICTIONE.

I. 1 [a] SUPRA dicere incepimus justum bellum apud probos auctores dici sæpe, non ex causa unde oritur, neque ut alias ex rerum gestarum magnitudine, sed ob peculiares quosdam juris effectus. Quale autem sit hoc bellum optime intelligitur ex hostium definitione apud Romanos Jurisconsultos: *hostes sunt qui nobis, aut quibus nos publice bellum decernimus: ceteri latrones aut prædones sunt,* ait Pom- *L.* 118. *de Verb. sign.*

[a] *Supra*] Lib. I. cap. iii. § 4.

CHAPTER III. *Of a Just or Formal War by the Law of Nations; and herein of Declaration of War.*

I. 1 We have above begun to say that a *just* war is often so called in respectable authors, not from the cause in which it originates, nor from the scale of the movements, but on account of certain peculiar jural effects. What kind of war this is, is best understood from the definition of an enemy in the Roman Jurist: *Those are our enemies who publicly declare war against us or we against them: others are robbers or pirates,* says Pomponius. And so Ulpian, adding: *there-*

L. 24. D. de captiv. ponius: nec aliter Ulpianus: *hostes sunt quibus bellum publice populus Romanus decrevit, vel ipsi populo Romano; ceteri latrunculi vel prædones appellantur. Et ideo* [b] *qui a latronibus captus est, servus latronum non est, nec postliminium illi necessarium est. Ab hostibus autem captus, puta a Germanis et Parthis, et servus est hostium, et* L. 19. § 2. D. de captiv. *postliminio statum pristinum recuperat.* Et Paulus: [c] *A piratis aut latronibus capti liberi permanent.* Accedat illud L. 21. § 1. eod. tit. Ulpiani: *in civilibus dissensionibus, quamvis sæpe per eas respublica lædatur, non tamen in exitium reipublicæ contenditur: qui in alterutras partes discedent vice hostium non sunt eorum inter quos jura captivitatum aut postliminiorum fuerint: et ideo captos, et venundatos posteaque manumissos placuit supervacuo repetere a principe ingenuitatem, quam nulla captivitate amiserant.*

2 Illud tantum notandum, sub exemplo populi Romani quemvis intelligi qui in civitate summum imperium habeat. Philip. iv. 6. *Ille hostis est,* ait Cicero, *qui habet rempublicam, curiam, ærarium, consensum et concordiam civium, et rationem aliquam si res ita tulerit pacis et federis.*

II. 1 Non autem statim respublica aut civitas esse desinit [1] si quid admittat injustum, etiam communiter, nec

[b] *Qui a latronibus captus est, servus latronum non est*] Hinc argumentum *Pœnulo* Plauti: *Eunucho* Terentii. Talis et Eumæus *Odyss.* O. (vers. 402. *et seqq.*)

[c] *A piratis*] Pompeius a piratis captos liberos pronuntiavit. Appianus Mithridatico (pag. 237. *Ed. H. Steph.*) Adde Herreram tomo ii.

[1] Confer Pufendorfium, *De Jure Nat. et Gentium,* Lib. viii. cap. vi. § 5.

[d] *Criminis causa sociantur*] Ὅμιλος ἀνθρώπων οὐ νόμῳ ξυνιόντων, ἀλλ' ἐκ τοῦ ἀδίκου ξυνειλεγμένων· *turba homi-*

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fore he who is taken prisoner by robbers is not subject to them, nor is postliminium necessary for him. But he who is taken prisoner by enemies, suppose Germans or Parthians, becomes their slave, and recovers his former state by postliminium. So Paulus. Ulpian adds that, in civil wars, the opposite parties are not formal enemies, and therefore the captives taken do not lose their free condition.

2 We may note that which is said by the Roman jurists, of the Roman People, is to be understood of him who has the supreme power in any state. *He is our enemy,* says Cicero, *who has the government, the council, the treasury, the consent and agreement of the citizens, and the power of making war and peace.*

II. 1 A State or Commonwealth does not cease to be such by perpetrating an act of injustice, even in common: nor is a band of

cœtus piratarum aut latronum civitas est, etiamsi forte æqualitatem quandam inter se servent, sine qua nullus cœtus posset consistere. Nam hi [d] criminis causa sociantur: illi etsi interdum delicto non vacant juris tamen fruendi causa sociati sunt, et exteris jus reddunt, si non per omnia secundum jus naturæ, quod multos apud populos ex parte quasi obliteratum alibi ostendimus, certe secundum pacta cum quibusque inita; aut secundum mores. Sic Græcos, quo tempore mari prædas agere pro licito habebatur, abstinuisse a cædibus et populationibus nocturnis, et a raptu boum aratorum, notat ad Thucydidem scholiastes. Alios etiam populos, itidem ex Lib. i. 5. rapto viventes, ubi ex mari domum se receperant, misisse ad dominos [e] ut rapta si vellent æquo pretio redimerent, memorat Strabo. Ad tales pertinet et ille Homeri locus *Odysseæ* Lib. xi. pp. 495, 496. ξ (vers. 85, *et seqq.*):

> Καὶ μὲν δυσμενέες καὶ ἀνάρσιοι, οἵ τ' ἐπὶ γαίης
> Ἀλλοτρίης βῶσιν, καί σφιν Ζεὺς ληΐδα δώῃ,
> Πλησάμενοι δέ τε νῆας ἔβαν οἰκόνδε ἕκαστος,
> Καὶ μὲν τοῖς ὄπιδος κρατερὸν δέος ἐν φρεσὶ πίπτει.

> Ipsi etiam raptus avidi, qui aliena pererrant
> Littora, concessu Superum si præda reperta est,
> Navibus impletis abeunt, et vela retorquent:
> Quippe Deos metuunt memores fandi atque nefandi.

num non lege congregata, sed injustitiæ causa in unum coacta. Procopius II. *Vandalicorum.* (Cap. 15.)

[e] *Ut rapta si vellent æquo pretio redimerent*] Tales et illi quorum Saxo meminit libro XIV. (pag. 234.) Ideo Scyrios Plutarchus cum tempore pejores factos notat: ληϊζόμενοι δὲ τὴν θάλασσαν ἐκ παλαιοῦ, τελευτῶντες, οὐδὲ τῶν εἰσπλεόντων παρ' αὐτοὺς καὶ χρωμένων ἀπείχοντο ξένων· *cum ab antiquo mari prædas egissent, postremum ne iis quidem qui ad eos ipsos commercii causa navigabant, abstinuere injuriam.* (Vit. Cimon. p. 483 C.)

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robbers or pirates a state, although they preserve a sort of equal rule among them, without which indeed no body of men can hold together. For such a body is associated for the purpose of crime: but the others, though they are not free from fault, are associated by mutual rights, and acknowledge certain rights in others; if not rights according to Natural Law (which is often much obliterated), yet rights according to certain conventions or usages. Thus the Greeks, while they held it lawful to plunder at sea, abstained from murder, from night-attacks, and from seizing oxen and ploughs, as the Scholiast to Thucydides notes. Other nations, as mentioned by Strabo, who lived by plunder at sea, were in the habit, when they had carried their plunder home, of sending to the owners to ransom it at a fair price. So Homer.

2 Principale autem pro forma est in moralibus: et, ut recte Ciceroni dictum est *de Finibus* quinto, *ex eo quod maximas partes continet, latissimeque funditur, tota res appellatur:* cui convenit illud Galeni, ἀπὸ τοῦ πλεονεκτοῦντος ἐν τῇ κράσει γίνονται αἱ προσηγορίαι. Idem talia sæpe vocat ὀνομαζόμενα κατ᾽ ἐπικράτησιν. Quare crude nimis dictum est ab eodem Cicerone, *de Republica* tertio, ubi injustus est rex, ubi injusti optimates, aut ipse populus, non jam vitiosam sed nullam esse rempublicam: quam sententiam Augustinus corrigens, *nec ideo tamen*, ait, *vel ipsum non esse populum, vel ejus rem dixerim non esse rempublicam, quamdiu manet qualiscunque multitudinis rationalis cœtus rerum quas diligit concordi communione sociatus.* Corpus morbidum, corpus tamen est: et civitas, quanquam graviter ægrota, civitas est, quamdiu manent leges, manent judicia, et quæ alia necessaria sunt, ut ibi jus exteri consequi possint, non minus quam privati inter se. Rectius Dion Chrysostomus, qui legem (eam præsertim quæ jus gentium facit) dicit esse in civitate, ut mentem in corpore humano: [f] ea enim sublata civitatem non esse amplius. Et Aristides,

Cap. 30.

Apud August. *de Civ. Dei*, ii. 21.

De Civ. Dei, xix. 24.

Borysth. p. 443 A. *et de lege* p. 648 A.

Tom. ii. p. 385 A, B.

[f] *Ea enim sublata civitatem non esse amplius*] Cicero libro x. epist. 1: *Nec leges sunt, nec judicia, nec omnino simulacrum aliquod ac vestigium civitatis.*

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2 But in morals, the principal part is taken as the characteristic; so Cicero and Galen. Wherefore Cicero spoke too widely, when he said (in the third book of the *Republic*) that when the king is unjust, or the aristocracy, or the people itself, the commonwealth is not so much to be called vicious as non-existing: which opinion, Augustine correcting, says, *We are not to say that the people does not exist, or that its common concerns are not those of a commonwealth, so long as there remains a body of any reasonable number, associated by a common participation in its interests.* A body which is diseased is still a body; and a state, though grievously out of health, is a state, as long as there remain the laws, the tribunals, and other things which are necessary in order that strangers may there obtain justice, as well as private persons in their affairs one with another. Dio Chrysostom speaks more rightly when he says that law, (especially that which realizes the Law of Nations,) exists in a state, as the soul in the body; and that when that is taken away, the state no longer exists. And Aristides, in the oration in which he exhorts the Rhodians to concord, shews that many good laws may subsist even under a tyranny. Aristotle in his *Politics* says, if any one carry too far the violent proceedings either of the Few or of the People, the commonwealth first becomes vicious;

in ea qua Rhodios ad concordiam hortatur, ostendit etiam cum tyrannide leges multas bonas posse consistere. Aristoteles quinti *de Republica* capite nono ait, si quis nimium intendat vim paucorum aut populi, primo vitiosam fieri rempublicam, postremo nullam. Exemplis rem illustremus.

3 A latronibus captos capientium non fieri, supra dicentem audivimus Ulpianum. Idem captos a Germanis ait libertatem amittere. Atqui apud Germanos latrocinia, quæ extra civitatis cujusque fines fiebant, nullam habebant infamiam, quæ verba sunt Cæsaris. De Venedis Tacitus: *quicquid inter Peucinos Fennosque silvarum ac montium erigitur, latrociniis pererrant.* Idem alibi Cattos nobilem Germaniæ populum latrocinia agitasse dicit. Apud eundem Garamantes latrociniis fœcunda gens, sed gens tamen. Illyrici sine discrimine mari prædas agere soliti: de iis tamen triumphus fuit: Pompeio de piratis non fuit. Tantum discrimen est inter populum, quantumvis sceleratum, et inter eos, qui, cum populus non sint, sceleris causa coëunt.

L. 21. § 1. D. De captiv. *L. 24. D. ibid.* *Bell. Gall.* vi. 23. *De Morib. Germ.* c. 46. *Ann.* xii. 27. *Hist.* iv. 50. Appian. *Bell. Illyr.* p. 761.

III. Potest tamen mutatio incidere, non in singulis tantum, sicut Jephthes, Arsaces, Viriatus ex prædonum ducibus justi duces facti sunt, [g] sed etiam in cœtibus, ut qui prædones

Judic. xi. 3. [Justin. 41, 4; 44, 2. *J. Gr.*]

[g] *Sed etiam in cœtibus, ut qui prædones tantum fuerant aliud vitæ genus amplexi civitas fiant*] Exemplum in Mamertinis. Diodorus Siculus in fragmentis (e Lib. XXI. XXII.)

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and by going on, becomes non-existent. We will illustrate this by examples.

3 That a person taken prisoner by robbers is not subject to them, we have above quoted from Ulpian. He says also that those who are taken by the Germans do lose their liberty. Yet among the Germans, robberies which were exercised out of the boundaries of each state were subject to no infamy; which are the words of Cæsar. Tacitus says of the Venedi, *In the woody and mountainous region which occupies the whole space between the Peucini and the Fenni, they drive their booty freely.* The same writer elsewhere says that the Catti, a noble people of Germany, practise plunder. The same author calls the Garamantes a nation habituated to plunder, but still a nation. The Illyrians were accustomed to plunder at sea without distinction: yet a triumph over them was celebrated, as over an hostile nation; though Pompey had no triumph for conquering the Pirates. So great is the distinction between a people, though wicked, and those who, not being a people, associate for the sake of crime.

III. But a transition may take place from one condition to the

tantum fuerant aliud vitæ genus amplexi civitas fiant. Augustinus de latrocinio locutus: *hoc malum si in tantum perditorum hominum accessibus crescit, ut et loca teneat, sedes constituat, civitates occupet, populos subjuget, regni nomen assumit.*

De Civ. Dei, iv. 4.

IV. Summum autem imperium qui habeant diximus supra, unde intelligi et hoc potest, si qui pro parte habeant, pro ea parte justum bellum gerere: multoque magis eos qui non subditi, [h]sed inæqualiter sunt federati, quomodo inter Romanos et eorum socios, quanquam federe inferiores, Volscos, Latinos, Hispanos, Pœnos omnia justi belli exercita ex historiis discimus.

Cajet. 2, 2. q. 40. art. 1.

V. Sed ut justum hoc significatu bellum sit, non sufficit inter summas utrinque potestates geri: sed oportet, ut audivimus, ut et publice decretum sit, et quidem ita decretum publice [i]ut ejus rei significatio ab altera partium alteri facta sit, unde promulgata prælia [2]dixit Ennius. Cicero *Officiorum* primo: *at belli quidem æquitas sanctissime feciali populi Romani jure perscripta est: ex quo intelligi datur, nul-*

Cap. 11.

h *Sed inæqualiter sunt federati*] Ut dux Lotharingiæ, apud Crantzium *Saxonicis* XII. 13. Civitas Sundensis principibus suis Pomeranis bellum indixit. Idem Crantzius *Vandalicorum* XIV. 35.

i *Ut ejus rei significatio ab altera partium alteri facta sit*] Josephus *Antiquæ Historiæ* libro XV. (Cap. v. § 3. *divis. Huds.*) πόλεμον ἀκήρυκτον ἐπάγειν, ἀνομία· *bellum inferre non ante denuntiatum, injustum est.* Vide hujus gentium moris exempla apud Crantzium *Saxonicorum* XI. apud Oderbornium in *Vita Basilidis* lib. III. Facta contraria Turcæ Olizasthlanis, et Neemonis Servii, reprehendit Nicetas Lib.

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other; not only in individuals, as Jephtha, Arsaces, Viriatus, from being leaders of bands of robbers, became regular rulers; but also in societies, so that they who had been only robbers, embracing another mode of life, become a state. Augustine, speaking of bands of robbers, says, *If this evil, by the accession of bad men, grows to such a height that they keep possession of their ground, establish a seat of residence, occupy cities, subjugate peoples, it assumes the name of a kingdom.*

IV. Who have sovereign authority, we have discussed above: from whence it may be understood that if any have it partially only, they may, so far as that part goes, carry on a just war: and much more they who are not subjects, but bound by an unequal league; as under the Romans, we learn that the Volsci, Latins, Spaniards, Carthaginians, though inferior in the federation, all maintained just wars.

V. But that a war may be just in this sense, it is not sufficient that it be carried on between the supreme authorities on each side; but it is requisite also, as already said, that it be publicly decreed;

lum bellum esse justum, nisi quod aut rebus repetitis geratur, aut denuntiatum ante sit et indictum. Minus plene vetus scriptor apud Isidorum: *justum bellum est quod ex* Lib. xviii. 1.
edicto geritur, rebus repetitis aut propulsandorum hominum causa. Sic Livius bellum palam et ex edicto gerere Lib. i. 27.
dixit, in justi belli descriptione. Et cum narrasset Acarnanas Lib. xxxi. 14.
agrum Atticum esse populatos: *irritatio animorum ea prima fuit: postea justum bellum decretis civitatum ultro indicendo factum.*

VI. 1 Quæ loca et alia de belli promulgatione agentia ut intelligantur, accurate distinguenda sunt quæ jure naturæ debentur, quæ natura non debentur sed honesta sunt, quæ jure gentium requiruntur ad effectus juris gentium proprios, et quæ præterea ex peculiaribus populorum quorundam institutis veniunt.

Naturali jure, ubi aut vis illata arcetur, aut ab eo ipso qui deliquit pœna deposcitur, nulla requiritur denuntiatio. Et hoc est quod Sthenelaidas ephorus dicit [k]apud Thucydidem Lib. i. 86.
οὐ δίκαις οὐδὲ λόγοις διακριτέα μὴ λόγῳ καὶ αὐτοὺς βλαπ-

III. et IV. (Lib. III. cap. 6. Lib. V. cap. 4.)

[2] Non Ennius, sed Cicero, *promulgata prælia* dicit, *Orat. pro Mur.* cap. 14. ubi partem quamdam refert versuum veteris Poëtæ, quos integros nobis servavit AUL. GELLIUS, *Noct. Attic.* Lib. XX. cap. 9.

[k] *Apud Thucydidem*] Idem libro III. in Platæensium oratione: *κατὰ τὸν πᾶσι νόμον καθεστῶτα, τὸν ἐπιόντα πολέμιον ὅσιον εἶναι ἀμύνεσθαι· ex jure apud gentes omnes recepto fas est arcere eum a quo hostiliter impetimur.* (Cap. 56.) Flaminius apud Diodorum Siculum in excerptis Peirescianis, *ἐπεμαρ-*

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and in such manner publicly decreed, that signification of that fact is made by the one party to the other, as Ennius [Cicero, J. B.] speaks of *promulgated wars.* So Cicero, in his *Offices,* says that by the Fecial Law, no war was just except one preceded by a demand for redress, or by a declaration of war. So in Isidore. So Livy: and where he narrates that the Acarnanians wasted Attica, he adds, *This was the first irritation of the minds of the parties; afterwards a just war was decreed and declared by the states.*

VI. 1 In order to understand these passages concerning the declaration of war, we must distinguish what is done by Natural Law, and what is by nature not due, but only decent: what by the Law of Nations is required for the jural effects of that Law, and what, besides, follows from the peculiar institutions of certain peoples.

By Natural Law, when either violence is to be resisted, or punishment is to be exacted from an offender, no declaration is required. This is what Sthenelaidas the Ephor says in Thucydides: *We have*

τομένους· *non est quod verbis et judiciis disceptemus ultra verba læsi.* Et Latinus apud Halicarnassensem: τὸν ἄρχοντα πολέμου πᾶς ὁ προπάθων ἀμύνεται· *bellum inferentem is qui impetitur a se repellere solet.* Et Ælianus ex Platone ait, [3] quod ad propulsandam vim suscipitur bellum, non a caduceatore, sed a natura indici. Hinc Dion Chrysostomus in ea quæ est ad Nicomedienses, πόλεμοι ὡς ἐπὶ τὸ πλεῖστον ἀκήρυκτοι γίγνονται· *pleraque bella sine denuntiatione suscipiuntur.* Nec ob aliam causam Livius Menippo præfecto Antiochi objicit quod Romanos quosdam cecidisset nondum aut indicto bello, aut ita commisso ut strictos gladios aut sanguinem usquam factum audissent: eo ipso ostendens ex his duobus alterum potuisse ad facti defensionem sufficere. Neque magis per naturæ jus indictio necessaria est, si dominus rei suæ manum injicere velit.

Lib. i. *Ant. Rom.* c. 58.

Pag. 473 c.

Lib. xxxv. 51.

2 At quoties pro re una res alia, aut pro debito res debitoris invaditur, multoque magis si res eorum qui debitori

τύρατο πάντας ἀνθρώπους τε καὶ Θεοὺς, ἐπὶ τῷ προκατῆρχθαι τοῦ πολέμου τὸν βασιλέα· *omnes Deos hominesque testabatur, inceptum a rege bellum.* (Pag. 297.) Adde quæ habet Mariana xix. 13. De bello non indicto vide Dexippum in excerptis de legationibus: (pag. 6. *Edit. Hœschel.*)

[3] Minime loquitur de vi propulsanda, nec magis de indictione quadam, Ælianus, nimirum non Auctor ille notissimus *Variæ Historiæ*, et Animalium, sed scriptor Tacticorum: qui, ut probet, Artem Militarem omnium utilissimam esse, ait, omnibus Hominibus et Civitatibus, secundum Platonem, bellum inter se esse naturaliter, et quidem ἀκήρυκτον. Locus est cap. i. pag. 12. *Edit. Arcer.* 1613. Vide apud ipsum Platonem, *De Legg.* Lib. i. pag. 626 a. Tom. ii. *J. B.*

[1] *Honeste tamen et laudabiliter interponitur*] Vide Marianam xxvii. 13.

[m] *De tentandis rationibus belli vi-*

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not to wrangle in words and pleadings, being wronged in more than words. And Latinus in Dionysius: *He who begins a war may be repelled by the sufferer.* So Elian from Plato. Hence Dio Chrysostom says that *most wars are begun without declaration of war.* And on the same ground Livy objects to Menippus, the prefect of Antiochus, that he had slain certain Romans, war being neither declared, nor so far existing, that they had heard of swords drawn and blood shed; thus shewing that either of these two cases would have sufficed for the defense of the act. Nor is declaration of war any more necessary, if the owner attempts to lay hands upon his own property.

2 But whenever one thing is taken as security for another, or the property of the debtor is seized for the debt, and still more, if any one sets about taking the property of those who are subjects of the debtor, a formal demand is requisite, by which it may appear, that in no other way can we obtain our property or our debt. For

subditi sunt occupare quis velit, interpellatio requiritur, qua constet, alio modo fieri nequire ut nostrum aut nobis debitum consequamur. Jus enim illud non primarium est, sed secundarium et surrogatum, ut alibi explicavimus. Sic etiam antequam summam potestatem habens impetatur ex debito aut delicto subditi, interpellationem oportet intercedere quæ illum in culpa constituat, ex qua aut damnum dare censeatur aut et ipse delinquere, juxta ea quæ a nobis supra tractata sunt.

3 Verum etiam ubi jus naturæ non præcipit talem interpellationem fieri, [l]honeste tamen et laudabiliter interponitur, puta ut ab offendendo abstineatur, aut delictum pœnitentia et satisfactione expietur, secundum ea quæ [m]de tentandis rationibus belli vitandi diximus: quo et illud pertinet[4],

Extrema primo nemo tentavit loco.

Et [n]præceptum quod Deus Hebræis dedit, ut civitatem op- *Deut.* xx. 10.

tandi diximus] Lib. II. cap. xxiii. § 7.

[4] Versus est SENECÆ, *Agamemn.* vers. 153. *J. B.*

[n] *Præceptum quod Deus Hebræis dedit*] Josephus *Antiquæ Historiæ* v. 2. *ἐπέσχε δὲ αὐτοὺς ἡ γερουσία, πείσασα μὴ δεῖν ὀξέως οὕτως πρὸς τοὺς ὁμοφύλους ἐκφέρειν πόλεμον, πρὶν ἢ λόγοις διαλεχθῆναι περὶ τῶν ἐγκλημάτων, τοῦ νόμου μηδ' ἐπὶ τοὺς ἀλλοτρίους ἐφιέντος δίχα πρεσβείας, καὶ τοιαύτης πρὸς τὸ μετανοῆσαι πείρας, τοὺς δόξαντας ἀδικεῖσθαι στρατίαν ἀναγαγεῖν·* *sed retinuit eos senatus, ostendens non oportere ita subito bellum inferri popularibus, priusquam querelæ verbis disceptatæ sint, cum lex ne in externos quidem permittat injuria affectis producere exercitum nisi legatione prius missa, tentatisque viis, quibus ad saniorem mentem injuriæ auctores revocari possint.*

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this right of so taking is not a primary right, but a secondary and substitutive right, as we have elsewhere explained. And in like manner, before he who has the supreme power can be attacked for the debt or delict of his subject, there ought to be interposed a formal demand which may put him in the wrong, so that he may be either supposed to be the author of a damage, or to have himself committed a delict according to the principles already laid down.

3 And even when Natural Law does not require such a formal demand to be made, yet it is decent and laudable that it be interposed; in order, for instance, to avoid offense, or to give room for making atonement for the delict by repentance and satisfaction, as we have said in speaking of the ways of avoiding war; so that extremes are not to be tried in the first place. And to the same purpose is the precept which God gave the Hebrews, that before besieging a city they should invite it to make peace. This command, however, was specially given to the Hebrew people, and therefore is

pugnandam prius ad pacem invitarent: quod cum specialiter illi populo datum sit, male a nonnullis cum jure gentium confunditur. Neque enim erat illa qualiscumque pax, sed sub lege subjectionis et tributi. Cyrus cum in regionem Armeniorum pervenisset, antequam noceret cuipiam, misit ad regem qui debitum ex federe tributum et militem exigerent: *νομίζων φιλικώτερον εἶναι οὕτως, ἢ μὴ προειπόντα πορεύεσθαι, humanius id existimant quam si ultra duceret nihil*
De Cyr. Inst. ii. 4. § 19. *prædicens,* ut in ea historia Xenophon loquitur. Ceterum jure gentium ad effectus illos peculiares omnibus casibus requiritur denuntiatio, non utrinque, sed ab altera partium[5].

VII. 1 Sed hæc denuntiatio aut conditionata est, aut pura. Conditionata, ubi cum rerum repetitione conjungitur. [o]Rerum autem repetitarum nomine jus feciale comprehendebat non tantum vindicationem ex jure dominii, sed et persecutionem ejus, quod ex causa civili aut criminis debetur, ut recte explicat [p]Servius. Inde illud in formulis, *reddi, satisfieri, dedi;* ubi *dedi,* ut alibi diximus, intelligendum est, ni punire sontem malint ipsi qui conveniuntur. Hanc rerum repetitio-

[5] Quid si, non indicto bello, aliquis arma movit adversus alterum, et sic isti, qui sese defendere cogitur, non reliquit locum ac tempus belli indicendi? an tale bellum ideo minores effectus, Jure gentium, habebit? Deinde effectus illi, scilicet impunitas, et jus bello capta pro suis retinendi, nec ex indictione, nec ex Jure quodam Gentium voluntario oriuntur; ut suo loco ostendimus in Notis nostris Gallicis. *J. B.*

[o] *Rerum repetitarum nomine*] Vide Parutam *de Bello Cyprio* Lib. I. Bizarum Lib. XXIII. de Turcis. Reinking. Lib. II. classe iii. cap. 4.

[p] *Servius*] Ad X. *Æneidos.* (vers. 14.)

[q] *Plinius*] Libro XXII. 2. *Et legati cum ad hostes clarigatum mitterentur, id est, res raptas clare repetitum, unus utique Verbenarius vocabatur.* Et de Verbena agens libro XXV. 9. *Hæc est quam legatos ferre ad hostes indicavimus.* Vide Servium ad IX et X. *Æneid.*

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wrongly by some confounded with the Law of Nations. Cyrus, when he had come into the country of the Armenians, before he did any harm to any one, sent persons to the king to ask for the appointed tribute and soldiers; *thinking that more humane than to march upon him without notice,* as Xenophon says in the *Cyropædia.* But by the Law of Nations, a declaration of war is requisite in all cases to give occasion for these peculiar effects; not on both sides, but on one.

VII. 1 But such a declaration is either conditional or pure; conditional, when it is conjoined with a demand for the restoration of the things in question. But under the demand of restoration of things, the Fecial Law comprehended not only demands by the right of ownership, but also the promotion of anything which was due for civil claims or criminal acts; as Servius rightly explains. Hence the

nem dictam esse clarigationem testis est [q]Plinius. Conditionata est denuntiatio apud Livium: *eam se injuriam, nisi ab ipsis qui fecerint dematur, ipsos omni vi depulsuros esse,* et apud Tacitum, *ni supplicium in malos præsumant, usurum promiscua cæde:* et vetus ejus exemplum *Supplicibus* Euripidis, ubi Theseus caduceatori hæc dat mandata ad Creontem Thebanum (vers. 383, et seqq.): Lib. viii. 23. Lib. i. *Ann.* c. 48.

[r]Vicina Theseus qui tenet regni sola,
Humare poscit mortuos: quod si datur,
Sit amica, faciet gens Erechtidum tibi.
Hæc si probantur, tum refer retro pedem:
Sin nemo paret, verba sint hæc altera:
Jam mox ut arma pubis expectent meæ.

Papinius in ejusdem rei narratione (*Thebaid.* XII. 598):

Aut Danais edice rogos, aut prælia Thebis.

Polybius hoc vocat ῥύσια καταγγέλλειν, Romani veteres [6]*condicere.* Pura denuntiatio est quæ specialiter indictio aut edictum, ubi aut bellum jam alter intulit (et hoc est quod apud Isidorum dicitur bellum propulsandorum hominum causa) [s]aut ea deliquit ipse quæ pœnam merentur. *Orig.* xviii. 1.

(vers. 53. Lib. IX. 14. Lib. X.)

[r] *Vicina Theseus qui tenet regni sola*] Similis denuntiatio est in *Batrachomyomachia,* (vers. 135, *et seqq.*) et in *Amphitruone* Plauti initio. (Act. I. Sc. i. vers. 50.) Vide et Cromerum, Lib. XXI.

[6] Hoc *longe a vero alienissimum* opinabatur V. C. JAC. GRONOVIUS, in Not. ad Liv. I. 32. hac præcipue ratione nixus, quod Patris Patrati omnis opera ususque solummodo fuerit in jurejurando patrando et fœderis legibus recitandis; minime autem in denuntiando bello. Sed hoc falsum esse, ostendimus in Nota nostra Gallica ad hunc locum. Post quam scriptam læti videbamus nobiscum facientem Virum eruditissimum, JOANNEM JENSIUM, in Dissertatione *de Fecialibus Populi Romani,* cap. 6. quæ pars est *Ferculi literarii,* anno 1717. propositi. *J. B.*

[s] *Aut ea deliquit ipse quæ pœnam merentur*] Exemplum vide apud Bembum libro VII.

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formula requiring that the things be *restored, satisfied, given up:* where *given up,* as we have elsewhere explained, is to be understood that the persons summoned may be allowed to prefer themselves punishing the guilty person. This demand was called *clarigation,* as Pliny testifies. We have in Livy a conditional declaration: that *this injury, except it were remedied by those who had done it, they themselves would repel:* and in Tacitus, *except they exact punishment of the offenders, he would make a promiscuous slaughter.* And in the same way in the *Supplices* of Euripides; and Statius in his narration of the same matter in the *Thebais.* Polybius calls this *demanding satisfaction;* the old Romans, *condicere.*

A pure declaration is what is especially called *indictio.*

2 Interdum autem conditionatam pura subsequitur, quanquam id necesse non est, sed ex superabundanti. Hinc illa
Liv. i. 32. formula: *testor populum illum injustum esse, neque jus*
Ibid. *reddere.* Et altera: [t]*quarum rerum, litium, causarum condixit pater patratus populi Romani Quiritium patri patrato populi priscorum Latinorum, hominibusque priscis Latinis, quas res nec solverunt, nec dederunt, nec fecerunt, quas res dari, fieri, solvi oportuit, puro pioque duello quærendas censeo, consentio, consciscoque.* Et tertium carmen: *quod populi Prisci Latini adversus populum Romanum Quiritium fecerunt, deliquerunt, quod populus Romanus Quiritium bellum cum Priscis Latinis jussit esse. Senatusque Romanus Quiritium censuit, consensit, conscivit, ut bellum cum Priscis Latinis fieret, ob eam rem ego populusque Romanus populo Priscorum Latinorum bellum indico, facioque.* Hoc autem casu ita ut dixi, non esse præcise necessariam denuntiationem ex eo quoque apparet
Liv. xxxi. 8. quod ad proximum præsidium rite fieret, ut feciales in Phi-
Idem, xxxvi. 3. lippi Macedonis et postea in Antiochi causa consulti responderunt, cum prima denuntiatio ipsi facienda esset qui bello

[t] *Quarum rerum, litium, causarum*] Confer Græca Dionysii Halicarnassensis excerpto legationum II.

[u] *Caduceus apud Græcos*] Unde caducei origo disces ex Plinio XXIX. 3. et Servio ad IV. et VIII. *Æneidos.* [At Caduceus signum erat Pacis, non Belli. Id patet vel ex locis Plinii, et Servii, quos Auctor ipse indicat. Referam tantum verba SERVII: *Unde, secundum* LIVIUM, *legati pacis Caduceatores dicuntur. Sicut enim per Feciales a fœdere* (suppl. *dictos*) *bella indicebantur: ita pax per Caduceatores fiebat.* In *Æn.* IV. 242. Adde AUL. GELL. *Noct. Attic.* X. 27. ISIDOR. *Origin.* VIII. 11.

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2 But a conditional declaration is [often] followed by a pure declaration, though this is not necessary, but is done *ex superabundanti.* And the formulæ are given, accusing the enemy of injustice. But that in this case, as we have said, such declaration is not necessary, appears from this, that it might be made to the nearest town occupied by troops, as the Feciales announced, when they were consulted about the case of Philip of Macedon, and afterwards of Antiochus, since the first declaration of war was to be made by him who was attacked. In the war with Pyrrhus, the declaration was made to one of the soldiers of Pyrrhus, and this was done in the circus of Flaminius, when the soldier was compelled formally to purchase his place in order to be a party to the cause, as Servius relates on the ninth book of the *Æneid.*

3 That the formality is unnecessary, is also proved by this, that war is often declared on both sides, as the Peloponnesian war by the Corcyreans and Corinthians, though it was sufficient that it should be

petebatur. Imo et belli in Pyrrhum indictio facta est uni militum Pyrrhi, idque in circo Flaminio, ubi is miles locum emere dicis causa jubebatur, ut Servius narrat ad nonum Æneidos.

3 Supervacuæ observationis et hoc argumentum est, quod bellum sæpe utrinque indictum est, ut Peloponnesiacum a Corcyrensibus et Corinthiis, cum ab altera parte indictum esse sufficiat. Thucyd. i. 29.

VIII. A more autem et institutis quorundam populorum non a jure gentium sunt, [u]caduceus apud Græcos, sagmina et hasta sanguinea apud Æquicolas primum, et horum exemplo apud Romanos, renunciatio amicitiæ et societatis si qua intercessisset, post res repetitas triginta dies solennes, [x]hastæ missio iterum, et alia id genus, quæ cum his quæ proprie juris gentium sunt confundi non oportet. Nam et horum magnam partem suo tempore usurpari desiisse docet nos Arnobius: imo jam Varronis ævo quædam omittebantur. Punicum bellum tertium simul indictum, simul illatum est. Et Mæcenas [7]apud Dionem quædam horum vult propria esse status popularis.

Arnob. ii. *cont. gent.* [[c.67.]] p.91. Varro, iv. *de Ling. Lat.* p. 23. Vid Appian. *Bell. Pun.* p. 43.

IX. Indictum autem bellum ei qui imperium in populo

SUIDAM, voce Κηρύκειον: inprimis THUCYDIDEM, Lib. I. cap. 53. et ult. *J. B.*]

[x] *Hastæ missio*] Vide Servium ad IX. *Æneidos*, (vers. 53.) Ammianum XIX. et quæ ad eum notata a doctissimo Lindenbrogio, (cap. ii. pag. 229. *Ed. Vales. Gron.*)

[7] Nescio ubi. Nihil certe in Oratione illa satis longa, quæ Lib. LIII. legitur. Originem erroris ex eo, quod Auctor noster legerat apud Albericum Gentilem, ostendimus in Nota Gallica ad hunc locum. *J. B.*

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declared on one side only.

VIII. There are some things which belong to the institutions of certain nations, not to the Law of Nations in general; as the Caduceus, or Herald's rod among the Greeks; the *sagmina* (sacred herbs,) and bloody spear, among the Equicolæ at first, and the adoption of this by the Romans; the renunciation of friendship and alliance, if any had existed; the thirty appointed days after the demand of restitution; the sending of the spear a second time; and other observances of the same kind, which are not to be confounded with things which belong to the Law of Nations in general. For Arnobius informs us that the greater part of those things had ceased to be practised in his time; and even in the age of Varro some were omitted. The third Punic war was declared and commenced at the same time. And Mæcenas in Dio holds that some of these belong especially to a popular state.

IX. A war declared against him who has the supreme authority

summum habet, simul indictum censetur omnibus ejus non subditis tantum, sed et qui se socios adjuncturi sunt, ut qui accessio sint ipsius, et hoc est quod aiunt recentiores juris-consulti, diffidato principe diffidatos ejus adhærentes. Nam indicere bellum vocant diffidare: quod intelligendum est de eo ipso bello, quod adversus eum cui indictum est geritur: quomodo bellum Antiocho indictum cum esset, Ætolis separatim indici non placuit, quod ipsi palam se Antiocho adjunxissent: *Ætolos ultro sibi bellum indixisse* respondebant feciales.

Bald. *ad l.* 2. *C. de serv.* n. 70.

Liv. xxxvi. 3.

X. At eo bello absoluto, si ob auxilia suppeditata populus aut rex alter bello impetendi sint, ut effectus juris gentium consequantur, opus erit nova indictione. Jam enim non ut accessio spectatur, sed ut principale aliquid. Ac propterea recte dictum est, [y]non fuisse justum jure gentium bellum aut [8]Manlii in Gallo-Græcos, aut [9]Cæsaris in Ariovistum: non enim jam ut accessio alieni belli, sed principaliter impete-

[y] *Non fuisse justum jure gentium bellum aut Manlii in Gallo-Græcos*] Aut Ulyssis sociorum in Ciconas Priamo quondam auxiliatos, de quibus Homerus *Odysseæ* I. et ibi Didymus. (Lib. IX. vers. 40.)

[8] Vide supra Lib. I. cap. iii. § 5. num. 4. *J. B.*

[9] Immo bellum illud, in se spectatum, omnino justum erat. Diximus in Notis Gallicis. Vide et eruditam Dissertationem CHRISTOPHORI CELLARII, *De C. Julii Cæsaris adversus Ariovistum Regem aliosque Germanos Bello;* quæ sexta est collectionis editæ anno 1712. *J. B.*

[z] *Sicut nationes quædam etiam prælii diem et locum condixisse leguntur*] Ut Porsenæ Romani, memorante in Publicola Plutarcho, (pag. 105 c.) Turcæ biduo ante prælium ignes plurimos accendunt. Chalcocondylas VII.

[1] At æque, si non magis, certo de hac re constaret. Exercitu in fines re-

in a people is conceived as declared, at the same time, not only against all who are his subjects, but also against all who join themselves to him, as accessories to him; and this is what the [feudal] jurists say, that he who defies the prince defies his adherents; for to declare war they call *to defy*. This is to be understood of that especial war which is carried on against the person mentioned in the declaration: thus when war had been declared against Antiochus, it was not thought proper to declare it against the Etolians separately, because they openly joined Antiochus; the Feciales answered that *the Etolians had of themselves declared war against themselves.*

X. But if, when that war is over, a people or a king are to be attacked on account of aid supplied, then, in order to obtain the effects of the Law of Nations, there is need for a new declaration of war. And therefore it was rightly said that those were not just wars according to the Law of Nations, which Manlius carried on against the Gallo-Grecians, or Cæsar against Ariovistus: for they were then

bantur, quam ad rem sicut ex jure gentium indictio, ita ex jure Romano novus populi Romani jussus desiderabatur. Nam quod in rogatione contra Antiochum dictum erat: *vellent, juberentque cum Antiocho rege quique sectam ejus secuti essent bellum iniri:* quod et observatum in decreto adversus regem Persea, videtur intelligi debere quamdiu cum Antiocho aut Perseo bellum esset, et de his qui reipsa ei bello se immiscerent. Liv. xxxvi. 1. Lib. xlii. 31.

XI. Causa autem cur gentes ad bellum illud, quod jure gentium justum diximus, denuntiationem requirerent, non ea fuit quam adferunt nonnulli, ne quid clam aut dolo agerent, id enim ad fortitudinis præstantiam magis quam ad jus pertinet; [z]sicut nationes quædam etiam prælii diem et locum condixisse leguntur: sed [1]ut certo constaret non privato ausu sed voluntate utriusque populi aut populi capitum geri bellum: nam inde nati sunt effectus peculiares, qui neque in bello adversus Alb. Gent. ii. 1.

gionis misso. Revera scopus et finis præcipuus moris indicendi belli hic fuit, ut omnibus constaret, eum qui ad arma venit justam causam habere, et ut hosti ipsi significaretur, per eum stetisse et stare adhuc, quominus res alio modo dirimatur. Id innuit DIONYSIUS HALICARNASSENSIS, *Ant. Rom.* Lib. II. cap. 72. ubi de institutione collegii Fecialium agit: et SERVIUS in *Æn.* X. 14. Sed præsertim NONIUS MARCELLUS, cujus locum, quamvis in quibusdam depravatum, ad summam rei quod spectat, luculentum heic proferam: ITAQUE [Romani] *bella et tarde, et magna licentia* [legendum mihi videtur *decentia*, cujus vocis exemplum ex Cicerone auctor ipse profert, pag. 203] *suscipiebant: quod bellum nullum, nisi pium, putabant geri oportere, prius indicebant* [ita lego pro *indicerent*] *bellum iis, a quibus injurias factas sciebant: Feciales legatos res repetitum mittebant quatuor, quos Oratores vocabant.* In voce Feciales, pag. 529. *Ed. Mercer.* *J. B.*

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attacked, not as accessories in another's wars, but as principals; and to this effect, by the Law of Nations, a declaration of war was required, and by the constitution of Rome, a new edict of the people. For what had been said in the decree against Antiochus: *Do you decree that war should take place with Antiochus and his followers?* which form was also used with regard to Perseus, seems to require to be understood, as long as the war with Antiochus or with Perseus continued, and with regard to those who really joined in the war.

XI. The cause why nations require a declaration of war for that kind of war which we call *just* by the Law of Nations, is not that given by some, that nothing may be done clandestinely or fraudulently; for that is a matter rather of bold frankness than of right; as some nations are related to have announced beforehand the day and place of battle: but that it might be clearly known that the war was undertaken, not as a venture of private persons, but by the will of

prædones, neque in eo quod rex gerit in subditos locum habent. Ideo Seneca distincte dixit: *indicta bella finitimis, aut gesta cum civibus.*

Lib. iii. *de Ira*, c. 2.

Ayala, i. 5.

XII. Nam quod notant quidam et exemplis docent, etiam in bellis talibus capta fieri capientium, verum est, sed ex una dumtaxat parte, idque ex jure naturali, non ex jure voluntario gentium, ut quod gentibus tantum prospicit, non his qui sine gente sunt, aut pars gentis. Errant et in eo, quod putant bellum sui tuendi aut rerum tuendarum ergo susceptum indictione non egere: nam eget omnino: non quidem simpliciter, sed ad eos quos dicere cœpimus, et mox explicabimus, effectus.

Alb. Gent. *d.* ii. 2.

XIII. Ne illud quidem verum, non statim atque indictum est inferri bellum posse: quod Cyrus in Armenios, Romani in Carthaginienses, ut modo diximus, fecerunt. Nam indictio nullum post se tempus jure gentium requirit. Potest tamen fieri, ut ex naturali jure tempus aliquod requiratur ex negotii qualitate, puta cum res repetitæ sunt, aut pœna in nocentem postulata, et id negatum non est. Tunc enim id

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the two peoples or their heads: for from this public character arise peculiar effects, which do not take place either in a war carried on against pirates, or in one which a king makes against his subjects. And so Seneca speaks with a distinction, of *war declared against neighbours, or carried on against our own citizens.*

XII. For what some remark and illustrate by examples, that even in such wars, what is captured becomes the property of the captors is true, but on one side only, and that by Natural Law, not by the instituted Law of Nations; since that regards only nations and their dealings with nations, not those who are without nation, or are only part of a nation. They err in this, that they think that a war undertaken for the purpose of defending one's self or one's property, does not need to be preceded by a declaration of war; for it by all means needs such an introduction: not indeed simply, but for the sake of leading to the effects we have already partly explained, and shall explain further.

XIII. Nor is it true even that a war may not be begun immediately after it has been declared: which Cyrus did in Armenia, and the Romans towards the Carthaginians, as we have already said. For a declaration of war does not, by the Law of Nations, require any definite time after it. But it may be requisite that, by Natural Law, some time may be required, in consequence of the quality of the business: as for instance, if property is required to be restored,

dandum est tempus quo quod petitum est commode fieri possit.

XIV. Quod si jus etiam legationum violatum sit, non ideo tamen denuntiatione opus non erit ad eos quos dico effectus: sed sufficiet eam fieri quomodo fieri tuto potest, per literas scilicet: quomodo et citationes et denuntiationes alias fieri mos habet in locis minus tutis.

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or criminals to be punished, and this is not refused. For then, so much time is to be given as may conveniently suffice for doing what is asked.

XIV. But even if the rights of legation be violated, it does not follow that a declaration of war is not needed for the effects to which I refer: but it is sufficient if it be made in such way as it may safely be made, that is, by letter: as also it is usual to make summonses and denunciations in unsafe places.

CAPUT IV.

DE JURE INTERFICIENDI HOSTES IN BELLO SOLENNI, ET ALIA VI IN CORPUS.

I. *Belli solennis effectus generaliter exponuntur.*
II. *Vox* licere *distinguitur in id quod impune fit, nec tamen sine vitio, et in id quod vitio caret, etiamsi id non facere virtutis sit alicujus: additis exemplis.*
III. *Effectus belli solennis in sua generalitate consideratos referri ad licere impunitatis.*
IV. *Cur tales effectus introducti sint.*
V. *Testimonia de his effectibus.*
VI. *Ex hoc jure interfici et offendi omnes, qui intra fines hostium sunt.*
VII. *Quid si eo ante bellum venerint?*
VIII. *Subditos hostium ubique offendi, nisi lex alieni territorii obstet.*
IX. *Jus hoc offendendi etiam ad infantes et feminas porrigi:*
X. *Etiam ad captos, et quovis tempore:*
XI. *Etiam ad eos qui se dedere volunt, nec recipiuntur:*
XII. *Etiam ad deditos sine conditione.*
XIII. *Perperam id jus ad causas alias referri, ut ad talionem, pertinaciam defensionis.*
XIV. *Porrigi et ad obsides.*
XV. *Jure gentium vetitum veneno quenquam interimere:*
XVI. *Aut tela, aut aquas aliquas veneno inficere:*
XVII. *Non et aquas aliter corrumpere.*
XVIII. *Percussoribus uti an contra jus gentium sit, distinguitur.*
XIX. *Stupra an sint contra jus gentium.*

Æn. x. 14. I. AD illud Virgilii:

Tum certare odiis, tum res rapuisse licebit.

Servius Honoratus, cum juris fecialis originem ab Anco

[a] *Effectus quosdam esse proprios*] Crantzius *Saxonicorum* XI. 5.

[b] *Licet matrimonium contrahere, sed laudabilior est ex pio proposito cœlebs castitas*] Tertullianus *adversus Marcionem* I. *vacat abstinentiæ testimonium, si licentia eripitur.* (Cap. 29.) Vide de hac re, et de fuga in persecutione

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CHAPTER IV. *Of the right of killing enemies in formal War, and of other violence against the person.*

I. On the line of Virgil, *Æn.* x. 14, in which he says that after the declaration of war it will be lawful to ravage the enemy, Servius Honoratus gives an account of the origin of the Feciales, and the mode of claiming what had been taken from the Romans, and if satisfaction

Martio et ulterius ab Æquicolis petiisset, sic ait: *si quando homines aut animalia ab aliqua gente rapta essent populo Romano, cum fecialibus, id est, sacerdotibus, qui faciendis præsunt federibus, proficiscebatur etiam pater patratus, et ante fines stans clara voce dicebat belli causam, et nolentibus res captas restituere, vel auctores injuriæ tradere, jaciebat hastam, quæ res erat pugnæ principium, et jam licebat more belli res rapere.* Ante autem dixerat: *veteres lædere res rapere dicebant, etiamsi rapinæ nullum crimen existeret, similiter satisfacere res reddere dicebant.* Quibus docemur belli inter duos populos eorumve capita indicti [a]effectus quosdam esse proprios, qui bellum ex sua natura non sequuntur: quod cum iis optime convenit quæ ex jurisconsultis Romanis modo attulimus.

II. 1 Sed quod dixit Virgilius *licebit,* videamus quo pertineat. Interdum enim licere dicitur id quod rectum ex omni parte piumque est, etiamsi forte aliud quid fieri possit laudabilius, quale est illud Pauli apostoli: *πάντα μοὶ ἔξεστιν, ἀλλ' οὐ πάντα συμφέρει· omnia* (illius scilicet generis cujus sunt de quibus agere cœperat et acturus erat) *licent mihi, sed non omnia expediunt.* Sic [b]licet matrimonium contrahere, sed laudabilior est ex pio proposito cœlebs castitas, ut ad Pollentium ex eodem Apostolo disserit Augustinus. Repetere quoque nuptias licet, sed laudabilius est uno contentum esse

1 *Cor.* vi. 12.

De Adult. conj. i. 15. *et seqq.*

eundem Lib. I. *ad Uxorem.* Hieronymus *adversus Helvidium,* (Tom. II. pag. 14. in fin. *Edit. Basil.*) *virgo majoris est meriti dum id contemnit, quod si fecerit, non delinquit. Adversus Jovinianum* (Lib. I. pag. 25 B.) *ideo plus amat virgines Christus, quia sponte tribuunt quod sibi non fuerat imperatum. Ad Pammachium: semper grandia in audentium ponuntur arbitrio. Non tibi imponitur necessitas ut voluntas præmium consequatur.* (*Epist.* pag. 164. Tom. I.)

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were not given by restoration, declaring war by throwing a spear. *Rapere,* to ravage, and *satisfacere,* to restore, were words of a technical comprehensiveness. And thus we learn that a war declared between two nations, or their heads, has certain peculiar and appropriate effects, which do not follow from the nature of war itself: and this agrees with what we have already adduced from the Roman lawyers.

II. 1 But Virgil said *licebit,* it will be lawful; let us see what that implies. For sometimes *that* is said to be lawful which is every way right and pious; though something else might be done which is more laudable; as St Paul says, *all things* (of a certain kind) *are lawful for me, but all things are not expedient.* Thus it is lawful to marry, even when celibacy is better; it is lawful to marry a second time, though

matrimonio; ut recte hanc quæstionem explicat [c]Clemens Alexandrinus. Christianus conjux [d]paganam conjugem licite relinquere potest, ut sensit Augustinus, (quod quibus circumstantiis verum sit, discutere non est hujus loci) sed et potest retinere: itaque addit ille: *utrumque quidem pariter licitum est per justitiam quæ coram Domino est: et ideo nihil horum prohibet Dominus, sed non utrumque expedit.* Ulpianus de venditore cui post diem præstitutum vinum licet effundere: *si tamen cum posset effundere, non effundit, laudandus est potius.*

Ad Pollent. i. 19.

L. 1. § *licet.* 3. *D. de peric. et com. rei vend.*

2 [e]Alias vero licere aliquid dicitur, non quod salva pietate et officiorum regulis fieri potest, sed quod apud homines pœnæ non subjacet. Sic apud populos multos scortari licet: apud Lacedæmonios et Ægyptios etiam furari licebat. Apud Quintilianum est: *sunt quædam non laudabilia natura, sed jure concessa, ut in* XII. *tabulis, debitoris corpus inter cre-*

Lib. iii. 6.

Chrysostomus ad I. Cor. vii. (vers. 9. pag. 359. Tom. II. *Ed. Savil.*) *βελτίονα δείκνυσι τὴν ἐγκράτειαν, meliorem ostendit continentiam.* Ad Rom. vii. 6. *κἂν μὴ πειθώμεθα καὶ γέενναν ἠπείλησε, δεικνὺς ὅτι οὐ τῆς φιλοτιμίας τῶν ἀγωνιζομένων τὰ ζητούμενα, ὥσπερ ἡ παρθενία καὶ ἀκτημοσύνη, ἀλλὰ πάντως αὐτὰ ἠνυσθῆναι δεῖ· nisi præceptis obediamus gehennam minatus est, ostenditque hæc quæ postulat non esse ex iis quæ certantes suopte studio præstant, qualia sunt virginitas et possessionum abdicatio, sed omnino ea debent impleri.* (Pag. 91. eodem Tom.) Secunda oratione de jejunio: *ἀφῆκεν ἔξω τῶν σταδίων, ἀφῆκεν ἀνωτέρω τῶν ἀγώνων τὴν παρθενίαν. ἵνα καὶ οἱ κατορθοῦντες τὴν οἰκείαν μεγαλοψυχίαν ἐπιδείξωνται, καὶ οἱ μὴ κατορθοῦντες τῆς συγγνώμης ἀπολαύσωσι τοῦ δεσπότου· reliquit extra stadia, reliquit supra certandi legem continentiam virginalem, ut et qui id præstant animi sui ostendant magnitudinem, et qui non præstant indulgentia Domini fruantur.* (Tom. VI. pag. 833.) Quod mox aptat et ad *ἀκτημοσύνην* possessionum abdicationem. Adjice quæ habet Gratianus ex Augustino et aliis in causa XIV. quæstione 1.

[c] *Clemens Alexandrinus*] *Stromaton* IV. ubi inter alia de secundas nuptias faciente ait: *οὗτος οὐχ ἁμαρτάνει μὲν κατὰ διαθήκην. οὐ γὰρ κεκώλυται πρὸς τοῦ νόμου. οὐ πληροῖ δὲ τῆς κατὰ τὸ εὐαγγέλιον πολιτείας τὴν κατ' ἐπίτασιν τελειότητα· non peccat is quidem in fœdus: neque enim ulla lex est quæ*

once only is better; it is lawful for a Christian husband to leave his pagan wife (in certain circumstances), but he may keep her: as Augustine says, both are lawful before God, but not alike expedient. Ulpian says, that a seller, after the day appointed for delivering the wine, may let it run away; *but though he may thus shed it, if he do not, he is rather to be praised.*

2 In other cases a thing is said to be lawful, not which is agreeable to piety and duty, but which is not liable to punishment. So among some people fornication is, in this sense, lawful; and among

ditores dividi licuit. Est autem hæc vocis *licere* significatio minus propria, ut recte notat Cicero *Tusculanarum* quinta de Cap. 11.
Cinna loquens: *mihi contra non solum eo videtur miser quod ea fecit, sed etiam quod ita se gessit ut ea facere ei liceret: etsi peccare nemini licet, sed sermonis errore labimur: id enim licere dicimus, quod cuique conceditur:* recepta tamen, ut cum idem Cicero pro Rabirio Posthumo judices sic alloquitur: *quid deceat vos, non quantum liceat vobis, spectare* Cap. 5.
debetis: si enim quod liceat quæritis, potestis tollere e civitate quem vultis. Sic regibus dicuntur omnia licere quia sunt ἀνυπεύθυνοι, *exemti a pœnis humanis,* ut alibi diximus.
At regem, sive Imperatorem informans Claudianus recte ait: *De IV. Cons. Honor.* v. 267.

> Nec tibi quid liceat, sed quid fecisse decebit
> Occurrat.

Et Musonius castigat reges: μὴ τὸ καθήκει μοι λέγειν μεμε- Apud Stob. *Serm.* xlvi.
ληκότας, ἀλλὰ τὸ ἔξεστί μοι, *qui in more habent dicere* p. 326.
hoc mihi licet, non hoc me decet.

prohibeat, sed non implet excellentissimam evangelicæ vitæ profectionem. (Lib. III. cap. xii. pag. 548. *Ed. Oxon.*)

[d] *Paganam conjugem licite relinquere potest, ut sensit Augustinus*] Libro I. de adulterinis conjugiis ad Pollentium cap. 14. et 18. ex quibus locis multa transcripsit Gratianus in causam xxviii. quæst. 1.

[e] *Alias vero licere aliquid dicitur, non quod salva pietate et officiorum regulis fieri potest, sed quod apud homines pœna non subjacet*] Tertullianus in exhortatione ad castitatem: *licentia plerumque tentatio est disciplinæ.* (Cap. 8.) Ibidem: *omnia licent, sed non omnia pro salute.* Chrysostomus *de Pœnitentia* VIII. ὁ ἀκρίδας ἐκ βοτανῶν ἐσθίων καὶ μέλι ἄγριον, τῷ τὴν λαμπρὰν παρατιθεμένῳ καὶ βασιλικὴν τράπεζαν ἐξ αὐθεντίας προστάττει, οὐκ ἔξεστί σοι. καί τοι ἐδόκει βασιλεῖ πάντα ἐξεῖναι· *hic qui herbarum cacuminibus vescebatur et fero melle, illi splendidam et regiam mensam sibi apponere solito, cum auctoritate edicit, non licet tibi. Atqui videntur regi omnia licere.* (Tom. VI. pag. 808.) Columella præfatione libri VII. *Nec sane est vindicandum nobis quicquid licet: nam summum jus antiqui putabant summam crucem.* Hieronymus *ad Jovinianum: est vere jus summum summa malitia.* [Locus Columellæ est Lib. I. cap. 7. Hieronymi autem, non *ad Jovinianum,* sed *ad Innocentium,* Tom. I. pag. 235. *J. B.*]

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the Egyptians and Lacedæmonians, theft also. So the right of dividing the debtor's body was lawful by the twelve Tables. But this use of the word *licere*, to be lawful, is less proper, as Cicero says: *it is not lawful to commit a sin, but we are deceived by an erroneous phrase; for we say that is lawful which is allowed by law:* and in another place he says to the judges, *you are not to consider what is lawful or allowed, but what is decent and proper.* So to kings who are irresponsible everything is said to be *lawful.* But Claudian rightly says to a king, *You are not to consider what is lawful, but what becomes you.* And so Musonius.

3 Eoque sensu sæpe opponi videmus quod licet, et quod oportet, [f]ut a Seneca patre in controversiis non semel. Ammianus Marcellinus: *sunt aliqua quæ fieri non oportet, etiamsi licet.* Plinius in epistolis: *oportet quæ sunt inhonesta, non quasi illicita, sed quasi pudenda vitare.* Cicero ipse oratione pro Balbo: *est enim aliquid quod non oporteat, etiamsi licet.* Idem pro Milone *fas esse* ad naturam, *licere* ad leges refert. Et in declamatione patris Quintiliani est, aliud esse jura spectare, aliud justitiam.

Lib. xxx. 8. Lib. v. Ep. 14. Cap. 3. Cap. 16. *Decl.* 251.

III. Hoc ergo modo lædere hosti hostem licet, et in persona, et in rebus, id est, non ei tantum qui ex justa causa bellum gerit, quique lædit intra eum modum quem naturaliter concessum initio hujus libri diximus, sed ex utraque parte et indistincte: ita ut eam ob causam nec puniri possit in alio forte territorio deprehensus, tanquam homicida aut fur, nec bellum ipsi ab alio talis facti nomine inferri. Hoc sensu apud Sallustium legimus: *cui omnia in victoria lege belli licuerunt.*

Orat. ii. *ad Cæs. de Rep. ordin.* c. 48.

IV. Causa cur id gentibus [1]placuerit hæc fuit: quod inter duos populos de jure belli pronuntiare velle periculosum

[f] *Ut a Seneca patre*] Inter alia controversiarum libro IV. 25.

[1] Non opus est heic ullo consensu Populorum: sed ex ipso Jure Naturæ rationes peti possunt, quæ in omni Bello, etiam non solenni, valent. Fuse diximus in Notis nostris Gallicis. *J. B.*

[2] Non ad Senatum, sed ad Appium Legatum, in Concilio Achæorum. Inspice locum, a me distincte indicatum.

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3 And in this sense what is lawful is often opposed to what is right (*oportet*), as in Seneca repeatedly. So Ammianus, Pliny, Cicero. And Cicero opposes *fas esse*, what is right by nature, to *licere*, which is allowed by law. And Quintilian opposes *jura*, lawful rights, to justice.

III. In this latter sense, it is lawful to harm an enemy both in person and in property; and this, not only for him who is making a just war and who harms the enemy in the way which is allowed by Natural Law, as we have explained; but on both sides, and without distinction: so that he cannot for this reason be punished, if caught in another territory, as a homicide or a thief, nor can war be made on him on the ground of such an act. So Sallust says, *All being lawful to the victor by the laws of war.*

IV. The reason of this rule among nations was this: that for other nations to offer to pronounce on the right of war between two peoples, would be dangerous for those who interfered, and who might thus be involved in a war belonging to others; as the Massilians said,

fuerat aliis populis, qui ea ratione bello alieno implicarentur, sicut Massilienses in causa Cæsaris et Pompeii dicebant, neque sui judicii neque suarum esse virium discernere utra pars justiorem haberet causam: deinde, quod etiam in bello justo vix satis cognosci potest ex indiciis externis, quis justus sit se tuendi, sua recuperandi, aut pœnas exigendi modus, ita ut omnino præstiterit hæc religioni bellantium exigenda relinquere, quam ad aliena arbitria vocare. Achæi in oratione ad [2]senatum apud Livium, *quonam modo ea quæ jure belli acta sunt, in disceptationem veniunt?* Præter hunc effectum licentiæ, id est, impunitatis, est et alius, dominii scilicet, de quo posterius agemus.

Cæsar. *de Bell. Civ.* i. 35.

Lib. xxxix. 36.

V. 1 Illa autem, quam nunc tractare cœpimus, lædendi licentia primum ad personas porrigitur: de qua multa exstant apud probos auctores testimonia. Græcum est proverbium [g]ex tragœdia Euripidis:

> Καθαρὸς ἅπας τοι πολεμίους ὃς ἂν κτάνῃ·
>
> Purus profecto est quisquis hostem occiderit.

Itaque more Græcorum antiquo cum his, qui extra bellum occidissent hominem, [3]lavare, cibum aut potum sumere, mul-

J. B.

[g] *Ex tragœdia Euripidis*] *Ione*, (vers. 1334.)

[3] Vide supra Lib. I. cap. ii. § 5. num. 3. Adde duo loca luculenta Antiphontis, *Orat.* XIV. XV. pag. 93. *Ed. Wechel.* [[pag. 130. § 11.]] et *Orat.* XVI. pag. 139 [[pag. 145. § 4.]] Vide et Meursii *Themid. Attic.* Lib. I. cap. 15. *J. B.*

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in the case of Cæsar and Pompey, that they had neither jurisdiction nor power to discern which side was most in the right. And in the next place, it can scarcely be known by external indications, in a just war, what is the proper limit of self-defense, of recovery of property, or of exaction of punishment; so that it is by all means better to leave this to the conscience of the belligerents, than to appeal to extraneous decision. So the Achæans in their oration to the Senate*, ask, *In what manner are things done by the laws of war to be called under discussion?* Besides this effect of this allowable character of acts, there is another, as regards ownership, of which we shall have to speak hereafter.

V. 1 This right of doing harm to the enemy, extends, first to their persons, as we have many testimonies in Greek authors. *He is pure who slays enemies*, according to the Greek proverb in Euripides. And therefore by the usages of the Greeks, though it was not lawful to wash, or to eat, or to drink, and still less to join in sacred offices, with

* Not to the Senate, but to Appius the legate in the Achæan Council. J. B.

toque magis sacra facere fas non erat; cum his qui in bello, fas erat. Et passim occidere, jus belli vocatur. Marcellus
Lib. xxvi. 31. apud Livium: *quicquid in hostibus feci, jus belli defendit.*
Lib. xxi. 13. Apud eundem Alorcus ad Saguntinos: *sed hæc patienda censeo potius, quam trucidari corpora vestra: rapi, trahique ante ora vestra conjuges ac liberos belli jure sinatis.* Idem
Lib. xxviii. 23. alibi cum narrasset Astapenses occisos, addit, factum jure
Cap. 9. belli. Cicero pro Deiotaro: *tibi vero inimicus cur esset a quo cum vel interfici belli lege potuisset, regem se et filium suum constitutos esse meminisset?* Et pro M. Marcello:
Cap. 4. *nam cum ipsius victoriæ conditione jure omnes occidissemus, clementiæ tuæ judicio conservati sumus.* Cæsar Hæduis
Comm. de Bell. Gall. vii. 41. significat *suo beneficio conservatos, quos jure belli interficere*
Lib. iii. 8. § 5. *potuisset.* Josephus in *Bello Judaico:* καλὸν ἐν πολέμῳ θνήσκειν, ἀλλὰ πολέμου νόμῳ, τοῦτ' ἔστιν ὑπὸ τῶν κρατούντων· *pulchrum in bello occumbere, sed belli jure, id est, vitam adimente victore.* Papinius (*Thebaid.* xii. 522):

> Nec querimur cæsos: [h] hæc bellica jura, vicesque
> Armorum.

2 Jure autem belli cum dicunt hi scriptores, non tale intelligi quod actum culpa omni liberet, sed qualem dixi impu-
Ann. i. 48. nitatem, ex aliis locis apparet. Tacitus dixit *in pace causas et merita spectari, ubi bellum ingruat innocentes ac noxios*

[h] *Hæc bellica jura*] Servius in excerptis Fuldensibus ad ii. *Æneidos:* (vers. 538) *jure bellico Politen Pyrrhus occiderat: sed cur ante oculos patris?*

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those who had slain a man not in war; yet it was lawful to do so with those who had slain in war. And perpetually, to slay, is called the right of war. So in Livy, Marcellus, and Alorcus, and so of the Astapenses slain by the laws of war. So Cicero for Deiotarus and for Marcellus; Cæsar to the Hædui; Josephus; Statius; speak of persons slain, or liable to be slain, by the right of war.

2 That when these writers speak of the right of war, they do not mean a right free from all blame, but such an impunity as I have mentioned, appears from other places. So Tacitus says, *In peace, men's case and desert is regarded; when war comes, the guilty and the innocent fall alike.* And elsewhere, *The justice of men did not permit them to honour that slaughter, nor the right of war to avenge it.* And in the same way we must understand the right of war which Livy says the Achivi did not exercise against Eneas and Antenor, because they had always advised peace. So Seneca, in his epistles, says that *The things which, if men did privately, would subject them to capital punish-*

juxta cadere. Idem alibi: *nec illis aut honorare eam cædem jus hominum, aut ulcisci ratio belli permittebat.* Neque aliter sumendum jus belli, quod abstinuisse Achivos Ænea et Antenore memorat Livius, eo quod pacis auctores semper fuissent. Seneca in tragœdia *Troadibus* (vers. 335): Hist. iii. 51. Lib. i. 1.

Quodcunque libuit facere, victori licet.

Et in epistolis: [i] *quæ clam commissa capite luerent, tum quia paludati fecerunt, laudamus:* et Cyprianus, *homicidium cum admittunt singuli, crimen est: virtus vocatur cum publice geritur: impunitatem sceleribus acquirit non innocentiæ ratio, sed sævitiæ magnitudo.* Deinde: *consensere jura peccatis, et cœpit esse licitum quod publicum est.* Sic Lactantius Romanos ait legitime injurias intulisse. Nec alio sensu Lucanus: *jusque datum sceleri.* Epist. 95. Epist. 2. seu Lib. ad Donat. pp. 5, 7. Inst. Div. vi. 9. Phars. i. 2.

VI. Late autem patet hoc jus licentiæ: nam primum non eos tantum comprehendit, qui actu ipso arma gerunt, aut qui bellum moventis subditi sunt, sed omnes etiam qui intra fines sunt hostiles: quod apertum fit ex ipsa formula apud Livium: *hostis sit ille, quique intra præsidia ejus sunt.* Nimirum quia ab illis quoque damnum metui potest, quod in bello continuo et universali sufficit ut locum habeat jus de quo agimus: aliter quam in pignorationibus, quæ, ut diximus, ad exemplum onerum impositorum ad luenda civitatis debita introductæ Lib. xxxviii. 48. et alibi passim.

Spartianus Severo: *præter eos quos jus prælii absumsit.* (Cap. 14.)

[i] *Quæ commissa capite luerent, tum quia paludati fecerunt, laudamus*] Confer quæ supra libro II. cap. i. § 1.

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ment, when they are done in the general's cloak, we praise; and Cyprian, *When individuals commit homicide, it is a crime; it is called a virtue when done publicly. Impunity is acquired not by innocence, but by the greatness of the mischief done.* And again, *Rights were accommodated to the convenience of the offenders, and that became lawful which was public.* So Lactantius says that the Romans inflicted injuries legitimately, and Lucan speaks of *right given to wickedness.*

VI. And this right to do such things as allowable, is very comprehensive. For in the first place, it comprehends not only those who actually bear arms, or who are the subjects of him who makes the war, but all who are within the hostile boundaries; as appears by the formula in Livy: *Let him be an enemy, and those that are under his protection.* This is held, because such persons also may give occasion for fear, which in a continued and extended war, suffices to establishthe right of which we speak. This case is different from

Ad l. 5. D. de justitia. sunt: quare mirum non est, si, quod Baldus notat, multo plus licentiæ sit in bello quam in pignorandi jure. Et hoc quidem quod dixi in peregrinis, qui commisso cognitoque bello intra fines hosticos veniunt, dubitationem non habet.

VII. At qui ante bellum eo iverant, videntur jure gentium pro hostibus haberi [k]post modicum tempus intra quod Thuc. i. 26. discedere potuerant. Nam sic Epidamnum obsessuri Corcyræi peregrinis primum discedendi faciebant copiam, denuntiantes alioqui pro hostibus futuros.

VIII. 1 Qui autem vere subditi sunt hostium, ex causa scilicet permanente, eos offendere ubique locorum jure hoc gentium licet, si ipsorum personam respicimus. Nam cum alicui bellum indicitur, simul indicitur ejus populi hominibus, ut supra ostendimus in formula indictionis: sic et in decreto, Liv. xxxi. 8. *vellent, juberent Philippo regi Macedonibusque qui sub regno ejus essent bellum indici.* Hostis autem qui est, ubique secun- *Incert. trag. Frag. v. 363.* dum jus gentium impeti potest. Euripides:

Νόμος γὰρ ἐχθρὸν δρᾶν ὅπου λάβῃς κακῶς.

Ubicumque prensum jura lædi hostem sinunt.

[k] *Post modicum tempus*] Bembus VII. historiæ. Ea defensione utitur Cicero pro Ligario. (Cap. 2.) Exemplum habes apud Livium libro XXV. cap. 22. de civibus Campanis. Alia apud Thucydidem libro IV. (Cap. 105.)

[l] *Sed ex jure ejus qui ibi imperium habet*] Confer dicenda infra cap. VI. § 26. et Albericum Gentilem Hispanicarum advocationum Lib. I. cap. 6.

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that of securities, which, as we have said, were introduced after the example of burthens imposed to pay the debts of the state; wherefore it is not to be wondered at that much more is allowable in war than in the law of securities. And this is not a matter of doubt as concerns strangers who enter the enemy's confines when war has been begun and is known.

VII. But those who had gone thither before the war, may, it would seem, by the law of nations, be held for enemies after a moderate time within which they could depart. And thus the Corcyreans, when about to besiege Epidamnus, first gave allowance to strangers to depart, and announced that if they did not, they would hold them for enemies.

VIII. 1 As to those who are truly the subjects of the enemy, that is, from a permanent cause, it is allowable to attack them wherever they are, by this right of nations, if we regard their persons. For when war is declared against any one, it is declared against the men of that people, as we shewed above; and so in the decree against Philip. And he who is an enemy may be attacked everywhere, as Euripides says. So Marcion of deserters.

Marcianus jurisconsultus: *transfugas licet, ubicumque inventi fuerint, quasi hostes interficere.* L. 3. *in fine D. ad l. Corn. de Sicar.*

2 Interfici ergo possunt impune in solo proprio, in solo hostili, in solo nullius, in mari. In territorio autem pacato, quod eos interficere aut violare non licet, id jus non ex ipsorum venit persona, [l]sed ex jure ejus qui ibi imperium habet. Nam civiles societates constituere potuerunt in eos qui in aliquo sunt territorio nihil per vim agi, nisi judicio tentato: sicut ex Euripide citavimus, Lib. ii. 21. § 6.

> Si crimen istis aliquod hospitibus struis,
> Jus impetrabis: vi quidem hinc non abstrahes.

Ubi autem judicia vigent, ibi personarum spectantur merita, et cessat jus istud promiscuum nocendi quod inter hostes introductum dicimus. Narrat [m]Livius septem triremes Pœnorum fuisse in portu ejus ditionis cui Syphax imperabat, cui pax eo tempore erat cum Carthaginiensibus Romanisque; advenisse eo cum duabus triremibus Scipionem, opprimique a Pœnis potuisse priusquam portum intrarent; sed vento acriore illatas in portum antequam Pœni anchoras molirentur: tum vero Pœnos nihil ausos in regio portu. Lib. xxviii. 17.

Wechnerum in consilio Franconico 92.

[m] *Livius*] Vide simile factum Venetorum Græcos impedientium ne in portu juris Veneti Turcis noceant, apud Chalcocondylam Lib. IX. de Venetis et Turcis apud Tunetem, Bembum Lib. IV. de Pisanis et Genuatibus in Sicilia, Bizarum bello Pisano, de Rostochio et Gripswaldia Paulinum Gotthum.

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2 Therefore we may slay such persons on our own soil, on the hostile soil, on ground which is no one's, and on the sea. That it is not lawful to slay them, or do them violence, in a peaceful neutral territory, is a consequence, not of their personal rights, but of the rights of the lord of the territory. For civil societies may establish a rule that, against those who are in any territory, nothing shall be done by violence, except when judicial proceedings have been tried; as we have already quoted from Euripides. And when judicial proceedings are in force, then the deserts of persons are regarded, and there is an end of that promiscuous right of doing harm, which, as we have said, has been established between enemies. Livy relates that seven ships of war of the Carthaginians were in a port belonging to Syphax, who was then at peace both with the Carthaginians and the Romans; and that Scipio came with two ships and might have been destroyed by the Carthaginians before they entered the harbour; but that coming with a brisk wind they struck into the port before the Carthaginians could raise their anchors; and then, in the port belonging to the king, the Carthaginians did not venture to attack them.

IX. 1 Ceterum ut ad rem redeam, quam late licentia ista se protendat vel hinc intelligitur, quod infantium quoque et feminarum cædes impune habetur, et isto belli jure comprehenditur. Non huc adferam quod Hesbonitarum feminas et pueros Hebræi occiderunt, et quod idem fieri imperatur in Cananæos, [n] et quorum connexa cum Cananæis erat causa: Dei ista sunt opera, cujus in homines jus majus est quam hominum in bestias, ut alibi disseruimus. Illud propius accedit ad testandum morem communem gentium, quod in Psalmo beatus dicitur fore qui Babyloniorum infantes petræ allidet, cui par est [o] Homericum illud (*Iliad.* XXII. 63):

Deut. ii. 34. *Deut.* xx. 16.

Ps. cxxxvii. 9.

καὶ νήπια τέκνα
Βαλλόμενα προτὶ ἄστυ ἐν αἰνῇ δηϊότητι·
Illisaque corpora terræ
Infantum, sævus dum concutit omnia Mavors.

[n] *Et quorum connexa cum Cananæis erat causa*] Ut Amalecitæ, de quibus Josephus libro VI. 8. in Saulis rebus: *ἐπὶ σφαγὴν γυναικῶν καὶ νηπίων ἐχώρησεν, οὐδὲν ὠμὸν οὐδ' ἀνθρωπίνης σκληρότερον διαπράσσεσθαι φύσεως ἡγούμενος, πρῶτον μὲν πολεμίους ταῦτα δρῶν· ad cædem feminarum etiam et puerorum processit, nihil existimans se crudele aut naturæ humanæ adversum in eo facere, primum quod hostes erant in quos id fiebat, &c.* (Cap. vii. § 2. *divis. Hudson.*)

[o] *Homericum illud*] Ex eodem Homero Severus in Britannos his verbis usus (apud Xiphilin. pag. 342. *Ed. H. Steph.* Locus est *Iliad.* VI. 57):

μηδ' ὅντινα γαστέρι μήτηρ
Κοῦρον ἐόντα φέροι, μηδ' ὃς φύγοι αἰπὺν ὄλεθρον.

nec qui latet abditus intra
Viscera matris adhuc fugiet crudelia fata.

[p] *Romani capta Ilurgi*] Scipio capta Numantia: Juliani milites in mulieres Daciris relictas. Zosimus III. (cap. 15.) Idem Julianus capta Majozamalcha. *Sine sexus discrimine vel ætatis, quicquid impetus reperit potestas iratorum absumsit:* ait Ammianus libro XXIV. (cap. iv. pag. 436.) [Quod de Scipione dicit Auctor, nullo auctore dicit. Contrarium patet ex eo quod narrat APPIANUS, *Bell. Hispan.* pag. 311, *Ed. H. Steph.* ex superstitibus Numantinis Scipionem quinquaginta tantum triumpho servasse, alios vendidisse. Immo alii volunt, Numantinos se ipsos omnes concremasse, ut ne unus quidem superfuerit. Vid. FLORUM, Lib. II. cap. 18. ibique Interpretes. *J. B.*]

IX. 1 To return to the subject; how wide this allowance of doing harm to enemies extends, may be understood from this; that the slaughter of infants and women is allowed to have impunity, as comprehended in that right of war. I will not here adduce the slaying of the women and the little ones of Heshbon (Deut. ii. 34); and what they did to the Canaanites and their allies; for these are the doings of God, who has a more absolute right over men than men have over brutes. But a passage which approaches more nearly to a testimony of the common usage of nations, is that in the Psalms, cxxxvii. 9, *Happy shall he be that taketh and dasheth thy little ones against the stones.* So Homer.

2 Thraces olim capta Mycalesso feminas quoque et infantes occiderunt, narrante Thucydide. Idem de Macedonibus cum Thebas cepissent narrat Arrianus. [p]Romani capta Ilurgi urbe Hispaniæ, ἔκτειναν ὁμαλῶς καὶ παιδία καὶ γυναῖκας, *sine discrimine interemerunt etiam mulieres et pueros,* quæ verba sunt Appiani. Germanicus Cæsar Tacito narratur vicos Marsorum (Germaniæ is populus) ferro flammisque pervastasse, additurque: *non sexus, non ætas miserationem attulit.* Titus Judæorum etiam [4]pueros et feminas in spectaculo feris laniandas proposuit. Et tamen hi duo ingenio minime sævo fuisse creduntur: adeo sævitia illa in morem verterat. Quo minus mirum si et senes interficiuntur, ut a Pyrrho Priamus.

Lib. vii. 29. *De Exp. Alex.* i. 8. *Bell. Hisp.* p. 272. *Ann.* i. 51. *Æn.* ii. v. 550, *et seqq.*

X. 1 [q]Ne captivi quidem ab hac licentia exemti. Pyrrhus apud Senecam ex recepto tunc more:

Troad. v. 333.

Lex nulla capto parcit aut pœnam impedit.

[4] Nihil hac de re apud Josephum. Immo diserte hic ait, captis Hierosolymis, Titum vendi jussisse omnes, qui infra decimum septimum annum essent. *Bell. Jud.* Lib. vi. cap. ix. § 2. *divis. Hudson.* Hausit Auctor noster ex Alberico Gentili, Lib. ii. cap. xxi. pag. 425, qui tamen nullum alium testem adfert, nisi Cardani Encom. Neron. ubi hic adversus Titum debacchatur, quasi Neroni comparandum, eo quod *uno spectaculo aliquot millia Judæorum, in quibus* pueri et mulieres, *feris dilaniandos exposuerit.* Cujus rei *auctorem* adfert *amicum* Titi Josephum, Tom. i. pag. 205. *Opp. Cardan. Ed. Lugd.* 1663. At Josephus ne γρὺ quidem de *pueris et mulieribus* habet, d. loc. *J. B.*

[q] *Ne captivi quidem ab hac licentia exempti*] Elisæus apud Josephum: τοὺς γὰρ νόμῳ ληφθέντας πολέμου, ἀποκτείνειν ἔλεγε δίκαιον· *belli jure captos interfici justum dicebat.* (*Antiq. Jud.* Lib. ix. cap. iv. § 3. *Ed. Hudson.*) Itaque Virgilius captivum inducit rogantem:

Per patrios manes, per spes surgentis Iuli,
Te precor hanc animam serves natoque patrique.

(*Æn.* x. 524.) lxx millia Slavorum captorum ab Ottone interfecta narrat Witikindus Lib. iii. [pag. 34. *Edit. Wechel.* 1577. ubi tamen *Septingenti captivorum* tantum *capite cæsi* dicuntur.]

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2 When the Thracians took Mycalessus they put to death the women and children. So the Macedonians did when they took Thebes; the Romans when they took Ilurgis in Spain; Germanicus ravaged the Marsi with fire and sword without mercy to sex or age. Titus exposed the children and women taken at Jerusalem to fight with wild beasts in the public spectacles*. And yet Germanicus and Titus are considered as humane men; so much had that kind of cruelty become customary. And hence we are the less to wonder that old men were slain, as Priam by Pyrrhus.

X. 1 Even captives were not exempted from this liability. No

* Barbeyrac shews that this assertion is not supported by good authors, and is apparently taken from a declamation of Cardan against Titus.

In Ciri Virgiliana belli lex hæc dicitur, etiam in feminas captivas. Ita enim ibi Scylla:

v. 446.

At belli saltem captivam lege necasses.

Sed et illo Senecæ loco de femina, Polyxena nimirum, occidenda agebatur. Hinc illud Horatii:

I. *Epist.* xvi. 69.

Vendere cum possis captivum, occidere noli.

Ponit enim licere: et Donatus, servos dictos qui servati essent, *quum eos occidi oporteret jure belli:* ubi illud oporteret, improprie, pro liceret positum videtur. Sic a Corcyræis interfecti captivi ex Epidamno, narrante Thucydide. Sic quinque millia captivorum ab Annibale occisa: et a M. Bruto non pauci. Apud Hirtium bello Africano Scipionem sic alloquitur centurio Cæsarianus: *tibi gratias ago, quod mihi vitam incolumitatemque belli jure capto polliceris.*

In Adelph. act. 2. sc. 1. v. 28. Lib. i. 30. Appian. *Hannib.* p. 321. Dion. xlvii. p. 405 D. Cap. 45.

2 Nec tempore ullo excluditur potestas occidendi tales servos, id est bello captos, quantum ad jus gentium pertinet: etsi legibus civitatum hic magis, illic minus adstringitur.

XI. Quin et supplicum occisorum passim occurrunt ex-

[5] Nescio unde hoc habeat Auctor, et vereor ut memoria eum fefellerit. Nihil hac de re invenio apud Scriptores historiæ Alexandri Magni. Immo Arrianus diserte ait, quotquot mercenariorum militum vivi in potestatem venerunt, vinctos in Macedoniam ad ergastula missos fuisse, Lib. I. cap. 17. Vide et finem ejusdem Libri. *J. B.*

[r] *Acceptos in deditionem sine conditione ulla legas interfici*] Vide Thuanum libro LXX. in anno CIↃ IↃ LXXX. in re-

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law spares or protects a captive. So Pyrrhus in Seneca, Scylla in the Ciris of Virgil; and so in the case in Seneca, where the captive was a woman, Polyxena. So Horace. Donatus says that *servi* were so called because they were preserved when the law of war was that they should be slain. So the captives at Epidamnus were slain; and five thousand captives by Annibal: and by M. Brutus not a few. So Cæsarianus in Hirtius speaks.

2 Nor is the power of killing such captives excluded by any lapse of time, so far as the Laws of Nations are concerned; though by the Laws of States, this right is restricted, in some places more, in some, less.

XI. We have even examples constantly of persons who offer themselves as suppliants, and are put to death; as seen in the act of Achilles in Homer, and Mago and Turnus in Virgil: which are narrated so as to imply a defense of the right of war which I have mentioned. And Augustine, praising the Goths who had spared those who begged for their lives, and those who took refuge in temples, says, *What would have been allowable by the right of war, they held not allow-*

empla, ut ab Achille apud Homerum, apud Virgilium Magonis *Iliad.* xx. 463, *et seqq.* xxi. 73, *et seqq.* *Æn.* x. 524; xii. 930, *et seqq.*
et Turni: quæ ita narrari videmus ut defendantur simul illo quod dixi belli jure: nam et Augustinus laudans Gothos qui supplicibus et in templa perfugientibus pepercerant: *Quod* *De Civ. Dei,* i. 1.
belli jure fieri licuisset, ait, *illicitum sibi esse judicarunt.* Nec qui se dedunt semper recipiuntur, ut in pugna ad Granicum Græci qui [5]Persæ militabant: apud Tacitum Uspenses *Ann.* xii. 17.
veniam liberis corporibus orantes: *quod aspernati,* inquit, *sunt victores, ut belli potius jure caderent.* Nota et hic belli jus.

XII. Sed et [r]acceptos in deditionem sine conditione ulla legas interfici, ut a Romanis Pometiæ principes, a [6]Sulla Sam- Liv. ii. 17.
nites, a Cæsare Numidas, et ipsum Vercingentorigem: imo Dion. Lib. xliii. p. 245 E.
mos hic ferme perpetuus Romanorum in hostium duces, sive *Idem,* xl. p. 156.
captos, sive deditos, [s]ut triumphi die occiderentur, quemadmodum Cicero nos docet quinta Verrina, Livius tum alibi, tum Cap. 30.
libro XXVI, Tacitus *Annal.* XII, et alii multi. Eodem Tacito Cap. 13. Cap. 19.
memorante, Galba decimari jussit, quos deprecantes in fidem *Hist.* i. 37.

bus Hiberniæ.

[6] De Samnitibus nihil tale reperio, nec apud Plutarchum, nec apud Appianum Alexandr. Sequutus est Noster, sine examine, Albericum Gentilem, Lib. II. cap. XVII. pag. 364. Et hic videtur confudisse quod legerat de Antemnatibus, in Vita Syllæ, a PLUTARCHO conscripta, pag. 471 D. sed in quo fuit insignis perfidia. *J. B.*

[8] *Ut triumphi die occiderentur*] Simile apud Regnionem in anno Iↄ CCCC V. (pag. 436. *Ed. Argentor.* 1609.)

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able for them. Nor are those who surrender always received, as in the battle of the Granicus, those were not who were serving under the Persians*; and in Tacitus, the Uspenses praying for pardon for the free persons; *which prayer,* he says, *the victors rejected, that they might rather fall by the right of war.* Here again note *the right of war.*

XII. Even those who have surrendered unconditionally and been received, you may find, in history, put to death; as the rulers of Pometia by the Romans; the Samnites † by Sulla, the Numidians, and Vercingentorix himself, by Cæsar. Indeed this was almost the constant practice of the Romans towards the leaders of their enemies, whether taken or surrendered, that they should be put to death on the day of the triumph: as Cicero tells us, and Livy, Tacitus, and others. Tacitus also relates that Galba ordered a body of men to be decimated whom he had received begging for their lives: and Cecina, having

* This is not supported by the historians of Alexander, as Barbeyrac shews.

† This is not supported by good historians: J. B. who explains the error.

Ibid. i. 68. acceperat: et Cæcina, in deditionem accepto Aventico, in Julium Alpinum e principibus, ut concitorem belli, animadvertit: ceteros veniæ vel sævitiæ Vitellii reliquit.

XIII. 1 [t]Solent interdum historici causam interfectorum hostium, captorum præsertim aut supplicum, referre aut ad talionem, aut ad pertinaciam in resistendo: sed hæ causæ, ut alibi distinximus, suasoriæ magis sunt quam justificæ. Nam talio justa et proprie dicta in eandem personam quæ deliquit exercenda est, ut intelligi potest ex his quæ de pœnæ communicatione dicta sunt supra. Contra vero in bello plerumque id quod talio dicitur in malum redundat eorum quorum in eo quod accusatur nulla est culpa. Cujus morem sic describit Bibl. xiv. 47. Diodorus Siculus: οὐ γὰρ ἠγνόουν δι' αὐτῶν τῶν ἔργων μαθόντες, ὅτι τοῖς διαπολεμοῦσι κοινῆς τῆς τύχης ὑπαρχούσης, ἀμφοτέρους κατὰ τὰς ἥττας τοιαῦτα ἀνάγκη πάσχειν, οἷα ἂν αὐτοὶ πράξωσιν εἰς τοὺς ἀτυχήσαντας· *neque enim ignorabant ipsis rebus edocti, cum bellantium par sit fortuna, alterutris, si male rem gessissent, id expectandum quod ipsi* Lib. xvi. 31. *in victos statuissent.* Apud eumdem Philomelus dux Phocensium, διὰ ταύτης τῆς κολάσεως τοὺς ἐχθροὺς ἐποίησε μετα-

[t] *Solent interdum historici causam interfectorum hostium, captorum præsertim aut supplicum, referre aut ad talionem, aut ad pertinaciam*] Ut Chalcocondylas libro VIII.

[u] *Pari pœna exacta*] Vide eundem Diodorum de Spondio et Amilcare Barca in *Excerptis Peiresianis.* (Pag. 277.)

[7] Vide etiam LIVIUM, Lib. II. cap. xvi. num. 9. *J. B.*

[8] TACITUS, loco in ora libri distincte indicato, loquitur tantum de *liberis*

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had Aventicum surrendered to him, put to death Julius Alpinus, as the instigator of the war: but left the others to the clemency or cruelty of Vitellius.

XIII. 1 Historians sometimes mention, as the cause of putting to death enemies, especially captives or suppliants, the rule of retaliation, or their obstinacy in resisting: but these causes, as we have elsewhere explained, are rather suasory than justificatory. For *retaliation*, which is just, and properly so called, must be exercised against the same person who has offended: as may be understood from what we have said of the punishment of accessories. But on the other hand, it commonly happens that what is called retaliation, falls upon those who have no share in the blame which is charged. The practice is, that those who are defeated, are made to suffer what they had intended to inflict; and that by such inflictions, the enemy are restrained from overbearing severities. So Diodorus.

2 As for obstinacy in defending one's own side, no one can think

θέσθαι τῆς ὑπερηφάνου καὶ δεινῆς τιμωρίας· "*pari pœna exacta effecit, ut hostes a superbo et insolenti supplicio temperarent.*

2 Pertinax vero studium in partes nemo est qui supplicio dignum judicet, ut apud Procopium Neapolitani Beli- 1 *Gott.* c. 8. sario respondent, quod tunc maxime obtinet cum partes illæ aut a natura assignatæ, aut honesta ratione electæ sunt. Imo tantum abest ut in eo crimen sit, ut pro crimine habeatur si quis præsidio decesserit, præsertim veteri jure militari Ro- Polyb. i. 17. et vi. 35. mano, quod hic nullam ferme admittebat metus aut periculi excusationem. *Præsidio decedere apud Romanos capitale est,* ait Livius. Ob utilitatem ergo suam quisque summo illo Lib. xxiv. 37. rigore, ubi visum est, utitur: defenditur autem rigor ille apud homines eo gentium jure, de quo nunc agimus.

XIV. Idem jus et in obsides usurpatum, nec in eos tantum qui se obligaverant quasi ex conventione, sed et in eos qui ab aliis traditi. A Thessalis occisi olim ducenti quinqua- Plut. *de clar. mulier.* p. 244 B. ginta, a [7]Romanis Volsci Aurunci ad trecentos. Notandum Dionys. vi. 30. autem solitos obsides dari etiam pueros, ut a Parthis [8]quod Tacit. *Ann.* xii. 10. et a Simone Macchabæorum uno factum legimus, et feminas 1 *Macc.* xiii. 16.

Parthorum Regum: ut et in loco Maccabæorum sequente, est simpliciter υἱούς. Sed vide Suetonium, *Calig.* cap. 19 et 45. ubi diserte *pueros obsides* memorat. Unde validior efficitur conjectura, quam Justus Lipsius elicit e loco Strabonis, *Geogr.* pag. 748. *Ed. Paris.* Sed alia sunt exempla in Historiis, puerorum qui obsides dabantur, ut Demetrius, Filius Seleuci Philopatoris, Regis Syriæ, duodecimum agens annum: Appian. *Syr.* pag. 116. *Ed. H. Steph.* A Romanis

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that a case for punishment, as the Neapolitans replied to Belisarius; and this is especially true when the part of each side in the war is either assigned by nature, or by choice for honourable reasons. Indeed this obstinacy is so far from being a crime, that it is a crime if any one leave his post; especially by the old military law of Rome: which admitted no excuse of fear or danger. *To quit one's post is with the Romans a capital crime,* says Livy. And therefore it is for his own utility, that a person uses this extreme rigour when he thinks it good: and this rigour is defended by that part of the Laws of Nations of which we now speak.

XIV. The same right has also been used towards hostages; and not those only who have bound themselves by some sort of convention, but those who are delivered up by others. By the Thessalians there were put to death on one occasion two hundred and fifty: by the Romans, the Volsci Aurunci, to the number of three hundred. It is to be noted also, that it was the custom to give boys as hostages, as

ut a Romanis Porsenæ temporibus, et a Germanis [9]narrante Tacito. *Hist.* iv.

XV. 1 Sicut autem jus gentium permittit multa, eo permittendi modo quem jam explicavimus, quæ jure naturæ sunt vetita, ita quædam vetat permissa jure naturæ. Nam quem interficere liceat, eum gladio an veneno interimas nihil interest, si jus naturæ respicias: jus inquam naturæ: nam generosius quidem est ita occidere ut qui occiditur sui defendendi habeat copiam: sed non debetur hoc cuiquam qui mori meruit. At jus gentium, si non omnium, certe meliorum, jam olim est, ne hostem veneno interficere liceat: qui consensus ortus est ex respectu communis utilitatis, ne pericula in bellis quæ crebra esse cœperant nimium intenderentur. Et credibile est a regibus id profectum, quorum vita ab armis ante alios defenditur, a veneno minus quam aliorum tuta est, nisi defendatur juris aliqua religione [x]et metu infamiæ.

Liv. xlii. 18. 2 Clandestina scelera vocat Livius de Perseo loquens: *De Bell. Gild.* v. 273. nefas Claudianus agens de insidiis in Pyrrhum a Fabricio re-

etiam obsides datos *impuberes,* patet ex historia Clœliæ illius nobilis, apud Livium, Lib. ii. cap. 13. *J. B.*

[9] Libro iv. *Hist.* quem Auctor heic in margine indicat, nihil tale de Germanis: sed in Germaniæ descriptione, cap. viii. num. 2. *J. B.*

[x] *Et metu infamiæ*] Senatores ad Pyrrhum: *ἵνα μὴ τὸ σὸν πάθος ἡμῖν διαβολὴν ἐνέγκῃ· ne nobis infamiam adferat siquid tibi acciderit.* [Non Senatores, sed Consules C. Fabricius et Q. Æmilius, hoc dicunt, in Epistola ad Pyrrhum, apud Plutarchum, *Vit. Pyrrh.* pag. 396 c. *J. B.*]

[y] *Qui licitum volunt hostem veneno*

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by the Parthians; and this was done by Simon the Maccabee; also women were given up by the Romans at the time of Porsena; and by the Germans, as Tacitus relates*.

XV. 1 As the Laws of Nations permit many things, (in this way of permitting which we have explained,) which are forbidden by Natural Law; so they forbid some things which are permitted by Natural Law. For him whom it is lawful to put to death, whether we put to death by the sword or by poison, it makes no difference, if we look to Natural Law. It is doubtless more generous to kill, so that he who is killed has the power of defending himself; but this is not due to him who has deserved to die. But the Laws of Nations, if not of all, at least of the best, have long been, that it is not lawful to kill an enemy by poison. This consent had its rise in common utility, that the dangers of war, which are numerous enough, may not be made too extensive. And it is probable that this rule proceeded from kings, whose life may be defended from other causes, better than the lives

* J. B. corrects this reference.

jectis, et Cicero scelus eandem historiam tangens. Communis exempli interesse ne tale quid admittatur aiunt consules Romani, in epistola ad Pyrrhum quam ex Cl. Quadrigario recitat Gellius: apud Valerium Maximum est, *armis bella, non venenis geri debere.* Et Tacito memorante, cum princeps Cattorum Arminii mortem veneno promitteret, rejecit Tiberius, ea se gloria æquans priscis Imperatoribus. Quare [y]qui licitum volunt hostem veneno occidere, ut ex [1]Vegetio Baldus, respiciunt merum naturæ jus; illud autem quod a gentium voluntate ortum trahit prætervident.

De Offic. iii. 22.
Noct. Att. iii. 8.
Lib. vi. 5. *num.* 1.
Ann. ii. 88.
Cons. ii. 188.

XVI. 1 Distat a tali veneficio nonnihil et ad vim accedit propius, spicula veneno inficere et geminare mortis causas, quod [z]de Getis tradit Ovidius, de Parthis Lucanus, de Afris quibusdam Silius, et nominatim de Æthiopibus Claudianus. [a]Sed hoc quoque contra jus est gentium non universale, sed gentium Europæarum, et siquæ ad Europæ melioris cultum accedunt: quod recte a Salisberiensi observatum est, cujus hæc sunt verba: *nec veneni, licet videam ab infidelibus ali-*

De Pont. i. *Eleg.* ii. 17.
Pharsal. viii. 304.
De Bell. Pun. iii. 271, *et seqq.*
De laud. Stilic. i. 350.
Polic. viii. 20. p. 653.

occidere] Vide de Venetis Bembum fine libri III.

[1] Apud Vegetium nihil tale legitur, ut jam observavit ALBERICUS GENTILIS, *De Jure Belli*, Lib. II. cap. VI. pag. m. 256. *J. B.*

[z] *De Getis tradit Ovidius*] De Scythis Plinius libro XI. 53. *Scythæ sagittas tingunt viperina sanie et humano sanguine: irremediabile id scelus mortem illico adfert levi tactu.* De Serviis vide supplementum Helmoldi cap. 4.

[a] *Sed hoc quoque contra jus est gentium*] Ideo Ilus Mermerides in *Odysseæ* A. Ulyssi negat venenum ad spicula (vers. 263):

Ἐπεί ῥα θεοὺς νεμεσίζετο αἰὲν ἐόντας.
Veritus vim Divum morte carentum.

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of other persons; but is less safe than that of others from poison, except it be defended by the scruples of conscience, and the fear of infamy.

2 Livy, speaking of Perseus, calls these clandestine atrocities: so Claudian and Cicero use like expressions. The Roman consuls say that it is required, as a public example, that nothing of the kind be admitted, in the epistle to Pyrrhus which Gellius gives. So Valerius. And when the prince of the Catti offered to procure the death of Arminius by poison, Tiberius rejected the offer; thus gaining a glory like that of the ancient generals. Wherefore they who hold it lawful to kill the enemy by poison, as Baldus, following Vegetius, regard mere Natural Law, and overlook the Instituted Law of Nations.

XVI. 1 Somewhat different from poisoning, is the use of poisoned arrows or missiles, as approaching to open force: doubling the means of death, as Ovid says. This was practised by the Getæ, Parthians, Africans, Ethiopians. This, however, is against the Law of Nations,

quando usurpatam, ullo unquam jure indultam lego licen-
Lib. iii. v. 273. *tiam.* Ideo *ferrum infamare veneno* dixit Silius.

2 Nam et fontes veneno inficere, quod ipsum quoque aut non latet, aut non diu latet, Florus ait esse non tantum contra morem majorum, sed et contra fas Deum: sicut jura gentium Diis asscribi auctoribus solere alibi quoque a nobis annotatum est. Neque vero mirum videri debet, si ad minuenda pericula tales sint quædam bellantium tacitæ conventiones, cum olim Chalcidensibus et Eretriensibus manente bello convenerit μὴ χρῆσθαι τηλεβόλοις, *ne missilibus uti liceret.*

Lib. ii. 20. [[Lib. ii. c. 19. § 1.]] Strabo, x. p. 488.

XVII. Ceterum non idem statuendum de aquis [b]sine veneno ita corrumpendis ut bibi nequeant, quod Solon et Amphictyones leguntur in barbaros justum censuisse: et Oppianus de Piscatu, quarto, ut suo sæculo solitum commemorat. Id enim perinde habetur quasi avertatur flumen, aut [c]fontis venæ intercipiantur, quod et natura et consensu licitum est.

Paus. *l. ult. seu* Phoc. c. 37. *Front.* iii. 7. n. 6. Æsch. *de male ob. leg.* p. 252 A.

XVIII. 1 An vero hostem interficere immisso percus-

[b] *Sine veneno*] Cadaveribus, asbesto, quibus usus in obsidione Auximi Belisarius. Procopius *Gotthicorum* II. (cap. 27) calcê, ut Turcæ ad Dibibram. Nicetas Lib. I. de Alexio Isaaci fratre. (Cap. 9.) Sunt talia et apud Ottonem Frisingensem, et Guntherum Ligurino. [Locus Oppiani, quem Auctor laudat in contextu, legitur in fine Lib. IV. vers. 685, *et seqq.* Sed ibi agitur de aquis veneno infectis: nec de more sui temporis loquitur Poeta, verum de eo quod solent hostes, quicumque sint, facere. *J. B.*]

[c] *Fontis venæ intercipiantur*] Vide Priscum in excerptis legationum. [Pag.

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not universal, but of European nations, and those which share in European culture, as John of Salisbury has rightly observed. So Silius speaks of *making the weapon infamous with poison.*

2 To poison fountains, which must be discovered before long, Florus says, is not only against old rule, but also against the law of the gods; as the Laws of Nations are often ascribed to the gods; nor is it to be wondered, if to diminish dangers, there be some such tacit conventions of belligerents; as formerly in the permanent war of the Chalcidians and Eretrians, it was agreed not to use missiles*.

XVII. But the same is not true of making waters foul and undrinkable without poisoning them; which Solon and the Amphictyons are said to have justified towards barbarians: and Oppian mentions as customary in his time. For that is the same thing as turning away a stream, or intercepting a spring of water, which is lawful both by Natural Law and by consent.

XVIII. 1 It is often made a question, whether it be consistent

* Of such acts in war, see *E. M.* 1062, &c.

sore per jus gentium liceat, quæri solet. [2] Sed omnino discrimen adhibendum est inter percussores, qui fidem expressam vel tacitam violant, ut subditi in regem, vasalli in seniorem, milites in eum cui militant, recepti ut supplices aut advenæ, aut transfugæ in eos qui receperunt, an vero nulla teneantur fide, quomodo [d] Pipinus Caroli Magni pater uno comitatus satellite trajecto Rheno hostem in cubiculo interfecisse narratur: quod et a Theodoto Ætolo in Ptolomæum Ægypti regem simili modo tentatum refert Polybius, οὐκ ἄνανδρον τόλμην, *virilem audaciam* vocans. Talis et ille laudatus ab historicis [e] Q. Mutii Scævolæ conatus, quem ipse sic defendit, *hostis hostem occidere volui.* Porsena ipse in hoc facto nihil nisi virtutem agnoscit. Valerius Maximus pium ac forte propositum vocat: laudat et Cicero pro P. Sextio.

Lib. v. 81. Liv. ii. 12. Lib. iii. 3. Cap. 21.

2 Nimirum hostem occidere ubivis licet, non naturæ tantum sed et gentium jure, ut supra diximus: nec refert quot sint qui faciant, aut patiantur. Sexcenti Lacones cum Leonida castra hostilia ingressi, recta tentorium regis petebant. Just. ii. 11.

29. *Ed. Hœschel.* ubi de Genserico, Vandalorum Rege: καὶ ἐκάκωσε καὶ τὰ ὕδατα.]

[2] De hac quæstione fuse diximus in Notis nostris Gallicis. Non ferebat modus istarum Notularum, ut quid de tota hac re sentiamus, heic explicaremus. *J. B.*

[d] *Pipinus*] Vide Paulum Warnafredi libro VI. (Cap. 37.)

[e] *Q. Mucii Scævolæ*] Qui Plutarcho ἀνὴρ εἰς πᾶσαν ἀρετὴν ἀγαθός· *vir ad omnem virtutem egregius.* [*Vit. Poplicol.* pag. 106 B.]

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with the Laws of Nations to send an assassin to put to death an enemy. But we must make a marked distinction between assassins who violate express or tacit faith; as subjects towards a king, vassals towards a seigneur, soldiers towards their general; those received as suppliants or as guests or as deserters, towards those who have received them; and on the other hand, those who are not bound by any such tie of good faith; as Pepin, the father of Charlemagne, with one attendant passed the Rhine and slew his enemy in his chamber; and Polybius relates that Theodotus the Etolian attempted the like against Ptolemy king of Egypt, *a manly deed of daring.* Such also is the attempt of Mutius Scævola, praised by historians, which he himself defends, saying, *An enemy I sought to slay an enemy.* And Porsena himself saw nothing but courage in the act: Valerius Maximus calls it a brave and pious deed; Cicero praises it.

2 In peril it is lawful to kill an enemy anywhere, not only by Natural Law, but by the Laws of Nations, as we have said above; nor does it make any difference how many they are who do or who suffer in such case. The six hundred Lacedæmonians with Leonidas entered

Liv. xxvii. 27. [f]Paucioribus idem licuit. Pauci erant qui Marcellum consulem ex insidiis circumventum occiderunt: et qui Petilium Cerialem parum abfuit quin in lecto confoderent. [g]Laudat Eleazarum Ambrosius, quod elephantem supereminentem ceteris adortus est, arbitratus ei insidere regem. Neque tantum qui hæc faciunt, sed et qui aliis faciendi auctores sunt, jure gentium inculpati habentur. Scævolæ ad audendum fuerunt auctores illi in bellis adeo sancti veteres Romani senatores.

Tac. *Hist.* v. 22. *De Offic.* i. 40. Vide 1 *Macc.* vi. 45, *et seqq.* Liv. ii. 12.

3 Neque movere quenquam debet, quod deprehensi tales exquisitis suppliciis affici solent: nam id ipsum non eo evenit quod in jus gentium deliquerint, sed quia eodem jure gentium in hostem quidvis licet: gravius autem aut levius malum statuit quisque pro sua utilitate. Nam sic et exploratores, quos mittere jure gentium haud dubie licet, quales misit Moses, qualis fuit ipse Josue, deprehensi pessime tractari solent: (ἔθος τοὺς κατασκόπους κτείνειν, *mos est explorato resinterficere,* ait Appianus) juste interdum ab his qui manifeste

L. 3. § *ult. ad l. Corn. de Sicar.* *Bell. Punic.* p. 21.

f *Paucioribus idem licuit*] Valens pecuniam promisit ei qui Scythæ cujusquam caput attulisset: ita pax obtenta. Zosimus IV. (cap. 22.)

g *Laudat Eleazarum Ambrosius*] Et Josephus *Antiquæ Historiæ* XII. (cap. ix. § 4. *divis. Hudson.*) Factum non dissimile Theodosii in Eugenium est apud Zosimum libro IV. (cap. 58.) Gallorum in regem Persarum, apud Agathiam: Persarum decem in Julianum, apud Ammianum XXIV. (cap. 4.) et Zosimum III. cap. 20. Alexii Comneni in Torusen, apud Nicetam Choniaten Lib.

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the enemies' camp, and sought their way to the royal tent. A smaller number might have done the same with equal right. Those were few who laid an ambush for Metellus the consul and slew him: and those who were very near stabbing Petilius Cerialis in his bed. Ambrose praises Eleazar because he attacked an elephant which was eminent above the rest, thinking that it carried the king. And not only they who do such acts, but they who procure others to do them, are held blameless by the law of nations. The persons who impelled Scævola to his deed were the old Roman Senators, so admired for their sanctity in war.

3 Nor ought any one to be moved by recollecting, that such persons, when taken, are put to the torture; for that happens, not because they have offended against the Laws of Nations, but because by the same Laws of Nations anything is lawful against an enemy; and each person inflicts on his enemy a heavier or a lighter ill according to his own utility*. And thus spies, whom undoubtedly it is lawful by the laws of nations to send, such as Moses sent, of whom Joshua was one, if taken are subject to the severest inflictions: (as Appian says, *It is*

* See *E. M.* 1064.

justam habent bellandi causam: ab aliis vero licentia illa quam dat belli jus. Quod si qui reperiuntur [h]qui tali opera oblata uti noluerint, id ad animi celsitudinem et virium apertarum fiduciam, non ad justi injustive opinionem referendum est.

4 At de his percussoribus, quorum facto perfidia inest, aliter censendum: neque enim ipsi tantum contra jus gentium faciunt, sed et qui eorum utuntur opera: quanquam enim in rebus aliis, qui malorum opera in hostem utuntur, peccare censeantur apud Deum, non autem apud homines, id est in gentium jus, quia ea in parte[3],

Mores leges perduxerunt in potestatem suam:

et decipere, ut Plinius loquitur, *pro moribus temporum prudentia est:* tamen intra jus interficiendi constitit hæc consuetudo: nam hic qui aliena utitur perfidia, violasse jus non naturæ tantum, sed et gentium creditur. Hoc docent illa Alexandri ad Darium: *Impia bella suscipitis; et cum ha-* Curt. iv. 1.

Lib. viii. *Epist. ad Rufin.* 18. n. 3.

VI. de Manuele: (cap. 4. ubi tamen de Andronico agitur, non de Alexio Comneno.) Bulgarorum in Nicephorum Imperatorem apud Zonaram. [Lib. XIV. cap. 15. Ceterum quid sibi voluerit Auctor, ubi ex Agathia factum Gallorum in Regem Persarum indicat, plane nescio. Apud illum enim Historicum nil de Gallis, nedum in Regem Persarum. *J. B.*]

[h] *Qui tali opera oblata uti noluerint*] Vide Cromerum pag. 113. (Lib. v.)

[3] Versus est PLAUTI, *Trinumm.* Act. IV. Scen. iii. vers. 30. *J. B.*

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the custom to kill spies): and this is just in some cases, on the part of those who have a just cause of war; in others, is justified by the allowance which the right of war gives. And if any have been found who would not stoop to use such means, that is to be referred to their magnanimity, and trust in the open force which they can use, not to an opinion of what is just or unjust.

4 But with regard to the assassins whose deed includes perfidy, we are to judge otherwise. For not only do the perpetrators of such deeds act contrary to the Laws of Nations, but also they who use their services. For though in other cases, they who use the services of bad men against enemies are held to offend in the eye of God, but not in the sight of man, that is, not to act against the Laws of Nations; for in these cases, as Plautus says, *Custom has drawn law to its side;* and as Pliny says, *To deceive according to the manner of the time is called prudence;* yet this custom has stopped short of the right of murder. For they who make use of the perfidy of others for such purposes, are held to have violated, not only Natural Law, but also the Laws of Nations. This is conveyed in the letter of Alexander to Darius: *You carry on an impious war; and though you act with arms*

beatis arma, licitamini hostium capita. Et mox: *qui ne*
Lib. iv. 11. *belli quidem jura in me servaveris.* Alibi: *ad internecionem mihi persequendus est, non ut justus hostis, sed ut per-*
Liv. xlii. 18. *cussor veneficus.* Eodem referendum illud de Perseo: *non justum apparare bellum regio animo, sed per omnia clandestina grassari scelera latrociniorum et veneficiorum.*
Liv. xliv. 1. Marcius Philippus de iisdem factis Persei agens: *ea omnia quam Diis quoque invisa essent, sensurum in exitu rerum*
Lib. ix. 6. *suarum.* Pertinet huc illud Valerii Maximi: [1] *Viriati cædes duplicem perfidiæ accusationem recepit: in amicis, quod eorum manibus interemtus est; in Q. Servilio Cæpione consule, quia is sceleris hujus auctor impunitate promissa fuit, victoriamque non meruit, sed emit.*

5 Causa cur hic aliud quam in rebus ceteris placuerit, ea ipsa est quam de veneno supra attulimus, ne nimium intenderentur pericula eorum maxime qui eminent. Negabat

[1] *Viriati cædes*] Scriptor de Viris illustribus, (Aurelius Victor, cap. 71.) *quæ victoria, quia empta erat, a senatu non probata.* Eutropius: *cum interfectores ejus præmium a Cæpione consule peterent, responsum est, nunquam Romanis placuisse, Imperatorem a suis militibus interfici.* (Lib. IV. cap. 7) ubi forte legendum, *a Cæpione consule promissum.* Sic quod in Sertorium admissum est, damnat Ammianus libro XXX. [Cap. 1 in fin. Non video ex aliis Auctoribus constare, de *promisso* illo præmio a Cæpione consule. Adeoque minime necessarium supplementum in Eutropii verbis. Rejicit etiam hanc emendationem Heumannus, in notis ultimæ Editionis, quam curavit Clariss. Havercampius. *J. B.*]

[4] In prima Editione heic legebatur: *Apud Curtium.* Et revera CURTIUS ita de Besso loquentem Alexandrum inducit: *Quem quidem cruci adfixum videre festino, omnibus Regibus Gentibus-*

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in your hands, you bargain for the heads of your enemies. And again: *You who have not even observed the rights of war towards me.* And elsewhere, *He is to be followed to his destruction, not as a regular enemy, but as an assassin or a poisoner.* To the same rule is to be referred what is said of Perseus; that *he did not make arrangements for a regular war with a royal mind; but used all the clandestine acts of assassins and poisoners.* So Marcius Philippus, referring to the same acts of Perseus, that *all those acts which were hateful to the gods, he would feel in the sequel of his fortunes.* And to the same point tends what Valerius Maximus says: that *the killing of Viriatus brought on a double accusation of perfidy:—against his friends, in that he was taken off by their hands:—against Servilius Cæpio the consul, because he was the author of this crime, by granting impunity to the perpetrators, and thus did not earn, but buy, a victory.*

5 The reason why, in this case, a different rule was made, from that which prevails in other things is, that the dangers which beset

Eumenes credere se, *quenquam ducum sic velle vincere, ut ipse in se exemplum pessimum statueret.* Apud [i]eundem cum Bessus Dario manus intulisset, dicitur exempli et communis regum omnium esse causa: et Œdipus regis Laii cædem vindicaturus apud Sophoclem sic ait:

Just. xiv. 1.
Lib. xii.
Œdip. v. 139.

Κείνῳ προσαρκῶν οὖν ἐμαυτὸν ὠφελῶ.

Et apud Senecam in ejusdem argumenti tragœdia (vers. 242):

Regi tuenda est maxime regum salus.

Consules Romani epistola ad Pyrrhum: *communis exempli et fidei visum est, ut te salvum velimus.*

Apud Aul. Gell. iii. 8.

6 In bello ergo solenni, aut inter eos qui belli solennis indicendi jus habent, id non licet: extra vero bellum solenne habetur pro licito, eodem gentium jure. Sic in Gannascum defectorem structas [k]insidias tales degeneres negat Tacitus. Curtius Spitamenis perfidiam minus ait invisam esse potuisse,

Ann. xi. 19.
Lib. vii. 5.

que fidei, quam violavit, meritas pœnas solventem. Lib. VI. cap. iii. num. 14. Sed quum aliquid huc faciens, quamquam non ita diserte, Auctor noster postea reperisset apud JUSTINUM, Lib. XII. cap. v. num. 11. addidit in ora libri XII. et in ipso contextu posuit *Apud eumdem*, scilicet Justinum, quem tamen tantum in margine supra indicat. *J. B.*

[k] *Insidias tales degeneres negat*] Sic de Florentio et Barchalba, qui defectorem Procopium adduxerant Ammianus, (Lib. XXVI. cap. 9. in fin.) *si principem legitimum prodidissent, vel ipsa justitia jure cæsos pronuntiaret: si rebellem et oppugnatorem internæ quietis, ut ferebatur, amplas ei memorabilis facta oportuerat deferri mercedes.* Sic laudatur Artabanes occiso Gontharide apud historicum Procopium, fine *Vandalicorum* secundi. (Cap. 28.) Adjice de Suchodolii cæde Cromerum libro XXVIII. (pag. 604. *Ed. Basil.*)

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eminent persons may not be too extreme. Eumenes said, that *he did not believe that any general wished to conquer in such a way that he should establish a very bad example against himself,* as Justin relates. And the same writer says that when Bessus had killed Darius, it was considered an example of what might happen to kings, and therefore a common cause of kings. So Œdipus in Sophocles; and Seneca in his tragedy on the same subject. The Roman Consuls wrote to Pyrrhus, *It seemed suitable to common example and to good faith that we should not be accessary to your death.*

6 And thus in a regular war, or between those who have the right of declaring a regular war, such a practice is not lawful. But out of regular war it is held lawful, also by the Laws of Nations. Thus, when such a plot was laid against Gannascus the traitor, Tacitus will not allow that it was degrading. Curtius says that the treachery of Spitamenes might be deemed less odious, because nothing that was done against Bessus, the murderer of his own king, could seem wrong.

quia nihil ulli nefastum in Bessum interfectorem regis sui videbatur. Sic et in latrones et piratas perfidia vitio quidem non caret, sed apud gentes odio eorum in quos committitur impunita est.

XIX. 1 Stupra in feminas in bellis passim legas et permissa et impermissa. Qui permiserunt, spectarunt injuriam solam in alienum corpus, cui subjacere quicquid hostile est, juri armorum non incongruens judicabant. Melius alii, qui non solam injuriam sed ipsum efferatæ libidinis actum hic considerarunt, et quod is neque ad securitatem pertineat, neque ad pœnam, ac proinde non bello magis quam pace impunitus esse debeat: atque hoc posterius jus est gentium non omnium, sed meliorum. Sic Marcellus antequam Syracusas caperet legitur [l]gessisse curam pudicitiæ etiam in hoste servandæ. Scipio apud Livium et sua et populi Romani interesse ait, *nequid quod uspiam sanctum esset apud ipsos violaretur:* uspiam, id est, apud moratiores populos. Diodorus Siculus de Agathoclis militibus: *οὔτε τῆς εἰς γυναῖκας ὕβρεως καὶ παρανομίας ἀπέσχοντο, ne a mulieribus quidem*

Aug. *de Civ. Dei*, i. 6.
Lib. xxvi. 49.
Bibl. xix. 8.

[l] *Gessisse curam pudicitiæ*] Et Lucullus narrante Xiphilino. [Immo Dione Cassio, Lib. xxxv. pag. 2 A.] Vide edictum Mauri Cabaonis apud Procopium *Vandalicorum* i. (Cap. 8.)

[m] *Vim nefariam*] Appianus Mithridatico de Chiis captis: *τὰ γύναια καὶ τὰ παιδία βαρβαρικῶς ὑπὸ τῶν ἀγόντων ὑβριζόμενα. mulieres et pueri barbarum in morem ab iis qui ducebant stuprati.* (Pag. 201.)

[n] *Inter Christianos*] Servarunt id Belisarius ubique, Totilas captis Cumis et Roma capta. Procopius hæc tradit

Thus also violation of faith in dealing with pirates and robbers is not blameless; but by usage, in consequence of the evil character of those against whom it is committed, it is unpunished.

XIX. 1 The violation of women in war you may perpetually find both allowed and disallowed. Those who allowed it, looked only at the injury done to the person, and judged that it was not incongruous to the laws of war that what belonged to the enemy should be subject to such injury. But others have judged better, who regarded, not only the injury, but the act of uncontrolled lust; and that the act has no tendency either to security or to punishment; and therefore ought to be no more unpunished in peace than in war: and this latter rule is the Law of Nations, not of all, but of the best. Thus Marcellus, before he took Syracuse, is recorded to have provided for the security of chastity, even in the enemy. Scipio says that it concerns both him and the Roman people that *nothing which is held sacred anywhere should be violated by them,* that is, by the more civilized people. Diodorus

[m]*vim nefariam abstinebant.* Ælianus cum narrasset a Sicyoniis victoribus feminarum ac virginum Pellenæarum pudicitiam prostitutam, sic exclamat: ἀγριώτατα ταῦτα, ὦ θεοὶ Ἑλλήνιοι, καὶ οὐδὲ ἐν βαρβάροις καλὰ, κατάγε τὴν ἐμὴν μνείαν· *crudelia hæc per Deos Græciæ, et quantum memoria complector, ne ipsis quidem barbaris probata.* Lib. vi. *Var. Hist.* c. 1.

2 Atque id [n]inter Christianos observari par est, non tantum ut disciplinæ militaris partem, sed et ut partem juris gentium: id est ut qui pudicitiam vi læsit, quamvis in bello, ubique pœnæ sit obnoxius. Nam nec Hebræa lege impune *Deut.* xxi. 10. quisquam id tulisset, ut intelligi potest [o]ex ea parte quæ de captiva ducenda, neque vendenda postea, constituit. Ad quem locum Bechai magister Hebræus: *voluit Deus ut castra Israelitarum sint sancta, non projecta in scortationes et abominationes ceteras ut castra gentium.* Arrianus, cum *De Exped. Alex.* iv. 19. narrasset captum Roxanes amore Alexandrum, οὐκ ἐθελῆσαι ὑβρίσαι καθάπερ αἰχμάλωτον, ἀλλὰ γῆμαι γὰρ οὐκ ἀπαξιῶσαι· *noluisse ea ut captiva per libidinem abuti, sed matrimonio dignatum,* adjicit facti laudationem. Plutarchus

Gotthicorum III. [Cap. 1. et 20. ubi de Belisarii solita agendi ratione, et de Totila, eodem modo se gerente, postquam Roma potitus est. Sed Cumas Auctor heic posuit pro Neapoli. Vide cap. 8. ejusdem Libri. *J. B.*]

[o] *Ex ea parte quæ de captiva ducenda*] Quam facunde explicat Philo libro περὶ φιλανθρωπίας, (pag. 706, *et seqq.*) Josephus altero *contra Appionem:* τῶν αἰχμαλώτων προυνόησεν ὅπως αὐτῶν ὕβρις ἀπῇ, μάλιστα δὲ γυναικῶν· *lex etiam pro bello captis curam gessit, ut absit ab eis contumelia, maxime a mulieribus.* (Pag. 488. § 29. *division. Hudson.*)

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says of the soldiers of Agathocles, that they did not abstain from wicked violence against the women; and Elian, when he had related that the women and virgins of Pellene were violated by the victorious Sicyonians, exclaims, *Savage is this, O gods of Greece, and shocking even among barbarians, so far as I recollect.*

2 And it is fit that this rule should be observed by Christians, not only as part of military discipline, but as part of the Law of Nations: that is, that he who violates a woman, even in war, shall be everywhere liable to punishment. By the Hebrew law, no one could have committed such an act with impunity; as may be understood from what is said, Deut. xxi. 14, of marrying a captive and then not selling her, on which place, Bechai, a Jewish master, observes: *God willed that the camp of the Israelites should be holy, not given up to fornication and other abominations, like the camps of the heathen.* Arrian, when he has narrated that Alexander was captivated with the love of Roxana,

De fortun. Alex. Orat. ii. p. 332 E. de facto eodem: οὐχ ὕβρισεν, ἀλλ' ἔγημε φιλοσόφως, *non per libidinem abusus ea est, sed uxorem duxit, ut dignum philosopho.* Et Torquatum quendam, quod hostili virgini vitium obtulisset, Romanorum decreto [p] in Corsicam deportatum annotavit Plutarchus. Paral. pp. 308, 309.

[p] *In Corsicam deportatum*] At Persarum rex Chosroes eum qui Apameæ puellæ vim intulerat cruci affixit. Procopius *Persicorum* II. (Cap. 11.)

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adds, that *he would not humble her as a captive, but take her in marriage;* and praises the deed. Plutarch says of the same act, *He did not humble her, but took her to wife like a philosopher.* Plutarch relates also that by a decree of the Romans, a certain Torquatus was banished to the island of Corsica for violating a virgin of the enemy.

CAPUT V.

DE REBUS VASTANDIS ERIPIENDISQUE.

I. *Res hostium corrumpi et rapi posse.*

II. *Etiam sacras: quod quomodo intelligendum.*

III. *Et religiosas: addita itidem cautione.*

IV. *Doli quatenus hic permissi.*

I. NON [a]esse contra naturam spoliare eum, quem honestum est necare, dixit Cicero. Quare mirum *Offic.* iii. 6. non est, si jus gentium corrumpi ac rapi permiserit res hostium quos, interficere permiserat. Polybius itaque historiarum Cap. 11. quinto, jure belli comprehendi ait ut munitiones hostium, portus, urbes, viri, naves, fructus, et si qua sunt similia, aut eripiantur, aut corrumpantur. Et apud Livium legimus, *esse* Lib. xxxi. 30. *quædam belli jura, quæ ut facere ita pati sit fas: sata exuri, dirui tecta, prædas hominum pecorumque agi.* Ipsas urbes totas dirutas, aut mœnia solo æquata, populationes agrorum, incendia singulis ferme paginis apud historiarum scriptores invenias. Et notandum licere hæc et in deditos. *Oppidani,* inquit Tacitus, *portis sponte patefactis se suaque* *Ann.* xiii. 41.

[a] *Non esse contra naturam spoliare eum quem honestum est necare*] Suetonius Nerone XL. *tanquam occasione nata spoliandarum jure belli opulentissimarum provinciarum.* Cyprianus *de Mortalitate: sic cum irruptione hostili civitas aliqua possessa est, omnes simul captivitas vastat.* (Pag. 159. *Ed. Fell. Brem.*)

CHAPTER V. *Of Ravaging and Pillaging Property.*

I. Cicero says it is not against nature to despoil him whom it is honourable to kill. Wherefore it is not to be wondered at if the Laws of Nations permit the property of enemies to be destroyed and ravaged, when it has permitted them to be killed. Polybius says that by the Laws of War, all munitions of the enemy, ports, cities, men, ships, fruits, and anything of like kind, may be either plundered or destroyed. And in Livy we read; *There are certain rights of war which may be exercised and must be submitted to; as to burn crops, to destroy buildings, to drive off booty of cattle and men.* Indeed you find in every page of history, whole cities destroyed, walls levelled with the ground, lands depopulated, conflagrations raised. And it is to be noted that these measures are allowed also against those who have surrendered. *The townsmen,* says Tacitus, *opened their gates and put*

Romanis permisere, quod salutem ipsis tulit: Artaxatis ignis immissus.

II. 1 Neque jus gentium merum, seposita officiorum aliorum consideratione, de quibus dicemus infra, sacra excipit, id est, quæ Deo aut diis dicata sunt. *Cum loca capta sunt ab hostibus,* [b]*omnia desinunt sacra esse,* ait Pomponius jurisconsultus. *Sacra Syracusarum victoria profana fecerat,* ait Cicero Verrina quarta. Causa hujus est, quod quæ sacra dicuntur, revera non eripiuntur humanis usibus, [c]sed publica sunt: sacra autem nominantur a fine cui destinata sunt. Signum ejus quod dico est, quod cum quis populus alteri populo aut regi se dedit, tum etiam ea dedi quæ divina dicuntur, ut ex formula apparet quam citavimus alibi ex Livio: cui convenit illud in *Amphitruone* Plauti (Act. I. Scen. 1, vers. 71):

L. cum loca 36. D. de relig.

Cap. 55.

Lib. i. 3. § 8.

Urbem, agrum, aras, focos, seque uti dederent.

Deinde (vers. 102):

Deduntque se, divina, humanaque omnia.

[b] *Omnia desinunt sacra esse*] Tertullianus *Apologetico* (cap. 25.) *Porro bella et victoriæ captis et eversis plurimum urbibus constant: id negotium sine Deorum injuria non est: eædem strages mœnium et templorum: pares cædes civium et sacerdotum: nec dissimiles rapinæ sacrarum divitiarum et profanarum. Tot igitur sacrilegia Romanorum, quot trophæa: tot de Diis, quot de gentibus triumphi: tot manubiæ, quot manent adhuc simulacra captivorum deorum.* Mox: *et bene, quod si quid adversi urbibus accidit, eædem clades templorum quæ et mœnium fuerant.* (Cap. 40.)

[c] *Sed publica sunt*] Marsilius Patavinus in defensore pacis cap. v. pag. 2. Nicol. Boerius decis. LXIX. num. 1. Bossius in crim. de foro competente num. 101. Cothmannus cons. 100. num. 30.

[d] *Eorum sint et templa*] Ostendit hunc morem et Polybii locus infra capite xii. § 7.

[e] *In belli usus conversas*] Ut a Syracusis tempore Timoleontis, in cujus vita id habet Plutarchus (pag. 247 E.) Chii mulctam sibi a Mithridate indictam etiam e sacris vasis conficiunt. Appianus Mithridatico, (pag. 201.) Pli-

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themselves at the mercy of the Romans, which was their safety; Artaxatæ was burnt.

II. 1 The mere Law of Nations, setting aside the consideration of other duties, of which we shall afterwards speak, does not except sacred edifices, that is, those which are dedicated to God or to gods. *When places are taken by the enemy, all ceases to be sacred,* as Pomponius the Jurist says. *The sacred places of Syracuse were desecrated by victory,* as Cicero says. The cause of this is that the places which are called sacred are not really abstracted from human uses; but are called sacred in consideration of the end to which they are destined. A sign of this is that when a people gives itself up to another people or king, it gives up also what are called sacred edifices, as appears by

2 Et ideo Ulpianus publicum jus etiam in sacris ait consistere. *L. 1. § 2 D. De Just. et Jur.* Pausanias Arcadicis ait morem fuisse Græcis barbarisque communem, ut res sacræ arbitrii eorum fierent qui urbes cepissent. *Cap. 46.* Sic Jovis Hercæi simulacrum, Troja capta, concessum Sthenelo, multaque alia ejus moris exempla commemorat. Thucydides lib. IV. *τὸν νόμον τοῖς Ἕλλησιν εἶναι, ὧν ἂν ᾖ τὸ κράτος τῆς γῆς ἑκάστης, ἤν τε πλέονος, ἤν τε βραχυτέρας, τούτων καὶ τὰ ἱερὰ ἀεὶ γίγνεσθαι·* Cap. 98. *jus hoc apud Græcos esse, ut qui imperium obtineant in terra aliqua magna aut parva,* [d]*eorum sint et templa.* A quo non discrepat illud apud Tacitum: *cunctas ceremonias Italicis in oppidis, templaque, et numinum effigies, juris atque imperii Romani esse.* *Ann. iii. 71.*

3 Quare et populus ipse, mutata voluntate, potest ex sacro profanum facere: quod non obscure indicant jurisconsulti Paulus et Venuleius: *L. inter stipulantem, 83. § sacrum, 5. et l. continuus, 137. § cum quis, 6. D. de verb. oblig.* et temporum necessitate videmus res sacras ab his qui sacraverant [e]in belli usus conversas, ut a

nius Lib. XVII. cap. ultimo de Porcio Catone agens: *idem arbores religiosas lucosque succidi permisit, sacrificio prius facto: cujus rei rationem quoque eodem volumine tradidit.* Sulla bello Mithridatico donaria ab Olympia, Epidauro, Delphis abstulit, Plutarcho narrante, (pag. 459) et Appiano, (pag. 206) idem pretium restituit. Diodorus Siculus in *Excerptis Peirescianis.* (pag. 406.) Augustus ex templis thesauros accepit mutuos, Appiano docente civilium v. (pag. 678) vasa sacra ab Agapeto oppignorata tradit Cassiodorus XII. 20. Heraclius in gravi necessitate vasa ecclesiæ in nummos vertit, sed postea pretium reddidit, ut narrat Theophanes. Vide et Annam Comnenam libro v. (cap. 1) et libro VI. (cap. 2.) Cromerum libro XXIII. (pag. 516. *Edit. Basil.*) orationem Laurentiani apud Bembum libro VI. Adde quæ infra dicentur capite XXI. § 23. [Neque locus Plutarchi de Syracusanis, neque Plinii de Catone, satis ad rem faciunt. Heraclium quoque pretium vasorum refudisse nec Theophanes nec Anastasius nec Auctor Historiæ Miscellæ scripsit. Vide Notas Gallicas. *J. B.*]

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the formula which we have elsewhere cited from Livy. So Plautus in the *Amphitruo.*

2 And therefore Ulpian says that public law includes sacred things also. Pausanias says that it is a practice common to Greeks and barbarians, that sacred things should be at their disposal who have taken the city. So when Troy was taken, the image of Hercæan Jove was granted to Sthenelus; and Thucydides mentions many examples of this usage: *that they who rule the land possess the temples.* And Tacitus's account is not really different, that in the Italic towns all the ceremonies, temples, images, are under the Roman authority.

3 Wherefore the people may change its will, and make a sacred building into a profane one; as Paulus and Venuleius not obscurely imply; and we see that, by the necessity of the times, sacred things

Pericle sub [1]pollicitatione restituendi tantundem, a [2]Magone in Hispania, a Romanis bello [3]Mithridatico, a Sulla, [4]Pompeio,
Pag. 832 A. Cæsare, [5]atque aliis factum legimus. Apud Plutarchum Tiberius Gracchus: ἱερὸν καὶ ἄσυλον οὐδὲν οὕτως ἐστὶν, ὡς τὰ τῶν θεῶν ἀναθήματα. χρῆσθαι δὲ τούτοις καὶ κινεῖν καὶ μεταφέρειν ὡς βούλεται τὸν δῆμον οὐδεὶς κεκώλυκε· *nihil tam sacrum sanctumque est quam quæ Deorum honori dicantur. Et his tamen uti populum, hæc transmovere nemo prohibet.* [f]In controversiis Senecæ patris legimus: *pro republica plerumque templa nudantur, et in usum stipendii dona conflamus.*
Apud Macr. *Sat.* iii. 3. Trebatius jurisconsultus temporum Cæsaris; [g]*profanum quod ex religioso vel sacro in hominum usum proprietatemque conversum est.* Hoc ergo gentium jure usus Germanicus
Ann. i. 51. in Marsos, narrante Tacito: *profana simul et sacra, et celeberrimum illis gentibus templum quod Tanfanæ vocabant, solo æquantur.* Pertinet huc illud Virgilii (*Æneid.* xii. 778):

> Colui vestros si semper honores,
> Quos contra Æneadæ bello fecere profanos.

[1] Vide hac de re Thucydidem, Lib. ii. cap. 13. et Diodorum Siculum, Lib. xii. cap. 40. *J. B.*

[2] Refert hoc Livius, Lib. xxxviii. cap. 36. *J. B.*

[3] Habet ex Appiano Alexandr. *De Bell. Mithrid.* pag. 185. *Ed. H. Steph. J. B.*

[4] De Pompeio nihil apud Scriptores veteres reperio, nisi quæ habet Dion Cassius, initio Lib. xli. At vide infra, pag. 174. *Ed. H. Steph.* Quod spectat Sullam, vide Notam Auctoris nostri. *J. B.*

[5] Vide Sueton. *Cæsar.* cap. 54. et ipsum Cæsarem, *Comm. De Bell. Civ.* Lib. i. cap. 6. *J. B.*

[f] *In controversiis Senecæ*] In excerptis iv. 4.

[g] *Profanum quod ex religioso vel sacro in hominum usum proprietatemque conversum est*] Servius *ad Æneidos* ii. (vers. 713) de Cereris templo: *Æneas scit ante esse profanatum.* Idem habet

are sometimes converted to the use of war by those who had consecrated them; as by Pericles, under the promise of restoring as much; by Mago in Spain; by the Romans in the Mithridatic war; by Sulla, Pompey, Cæsar, and others. In Plutarch, Tiberius Gracchus says; *Nothing is so sacred as what is dedicated to the honour of the gods; yet this may be used and removed by the people.* So Seneca says, that *for the service of the public, temples are stripped, and dedicated objects turned into money.* So Trebatius in the time of Cæsar. And Germanicus used this right of war, when in his war against the Marsians he destroyed the celebrated temple at Tanfana. So Virgil. And Pausanias notes that objects dedicated to the gods are taken by the victors; and Cicero calls this the law of war, speaking of P.

Deorum donaria [h]capi a victoribus solere notavit Pausanias: Lib. iii. 46.
et Cicero belli legem id vocat, de P. Servilio loquens: *signa*, In Verr. i. 21.
inquit, *et ornamenta ex urbe hostium vi et virtute capta belli lege atque imperatorio jure sustulit.* Sic Livius templorum ornamenta quæ Syracusis Marcellus Romam advexit Lib. xxv. 40.
parta ait *belli jure.* C. Flaminius pro M. Fulvio: *signa ablata et cetera facta quæ captis urbibus soleant.* [i]Fulvius Apud eumd. Liv. xxxviii. 43.
quoque in oratione belli jus hoc ipsum appellat. Et Cæsar Lib. xxxix. 4.
in oratione apud Sallustium referens quæ victis solent accidere, ponit et [k]fana spoliari. Bell. Catil. c. 50.

4 Illud tamen verum est, si quo in simulacro numen aliquod inesse credatur, id violari aut corrumpi nefas ab iis qui in ea persuasione conveniunt: et hoc sensu impietatis, aut læsi etiam gentium juris accusantur interdum qui talia commiserunt, nimirum ex talis opinionis positione. Aliud est si hostes non idem sentiant: sicut Judæis non permissum tantum, sed et præceptum est gentium simulacra abolere: nam quod sibi Deut. vii. 5.
accipere vetantur, id eam causam habet, quo magis Hebræi superstitiones gentium detestarentur, impuritatis admoniti ipso

ad III. et ad IX. *Æneidos* et ad XII. Ad eclogam vero septimam: *dona oblata numinibus tamdiu sacra sunt, et dona possunt dici, quamdiu non fuerint profanata.* (Ad vers. 31.)

[h] *Capi a victoribus solere*] Virgilius *Æneidos* V. (vers. 360):

Neptuni sacro Danais de poste refixum.

Plutarchus Fabio narrat, signum ab eo Herculis Tarenti captum, missumque in Capitolium: reliquos Deos Tarentinis relictos, ut iratos. (Pag. 187 C.) Huc spectat et quod modo ex Tertulliano attulimus, et ejusdem hoc ad nationes II. *Tot deinde de Diis quot de gentibus triumphi: manent et simulacra captiva; et utique sentiunt, quos non amant.* (Cap. 17.)

[i] *Fulvius*] Vide Polybium excerpto legationum 28.

[k] *Fana spoliari*] Vide Cromerum libro XVII. (pag. 402) de rebus Antiochensis Ecclesiæ captis a Chosroë, vide Procopium *Persicorum* II. (cap. 9.)

Servilius. So Livy, speaking of the ornaments of the temples brought by Marcellus from Syracuse to Rome. So C. Flaminius in Livy, and Fulvius in Polybius, and Cæsar in Sallust.

4 It is however true, that if there be any image in which a divine virtue is supposed to exist, it is wicked that it should be violated or destroyed by those who agree in that persuasion. And in this sense they who commit such acts are accused of impiety, or even of breaking the Laws of Nations; that is, on the assumption of such an opinion. It is another matter if the enemies do not so think. Thus the Jews were not only permitted, but commanded to destroy the idols of the Gentiles. For their being forbidden to take and keep them was for this reason; that the Hebrews might the more

contactus interdicto; non quasi alienis sacris parceretur, quomodo [1]Josephus exponit, Romanis haud dubie blandiens; sicut et in expositione præcepti alterius, de non nominandis gentium diis: quod ille ita explicat quasi illis obloqui vetarentur, cum revera honoris causa aut sine abominatione eos nominare lex non sineret. Sciebant quippe Hebræi Dei certissimo monitu in simulacris illis non habitare, aut Dei spiritum, aut bonos angelos, aut vim astrorum, ut deceptæ gentes existimabant, sed pravos et humano generi infestos dæmonas: ita ut recte

Hist. v. 4. dixerit Tacitus in Judæorum institutis describendis, *profana illis omnia quæ apud nos sacra.* Non mirum ergo est, si

1 *Macc.* v. 44. 63. et x. 84. templa profani cultus a Maccabæis incensa non semel legimus. Sic et Xerxes cum simulacra Græcorum corrupit, nihil fecit contra jus gentium, etsi multum id ad invidiam exaggerant

Asc. Ped. *in Verr.* i. 18. Græci scriptores. Nam [m]Persæ non credebant in simulacris esse ulla numina, sed Deum esse Solem, et portionem ejus

Hist. v. 8. aliquam ignem. Lege Hebræa, ut idem Tacitus recte, *templi limine præter sacerdotes arcebantur.*

[1] *Josephus*] *Antiquæ Historiæ* IV. 8. § 10. et libro adversus Appionem altero. (§ 33. *Edit. Huds.*)

[m] *Persæ non credebant in simulacris ulla esse numina*] Diogenes Laertius initio, τῶν δὲ ξοάνων καταγινώσκειν τοὺς μάγους· *damnari simulacra a magis.* [Lib. I. § 6. Vide ibi Not. Ægi-

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defeat the superstition of the Gentiles, being warned that there was defilement in the very touch of them; not as if they spared the sacred objects of other nations, as Josephus expounds the fact; no doubt speaking with a view to gain favour with the Romans: as he does also in the explanation of another precept, the prohibition of naming the gods of the Gentiles: which he explains as if they were forbidden to speak evil of them; whereas in reality the law did not permit Jews to speak of them with honour or without abomination. For the Hebrews knew, by the undoubted instruction of God, that these idols were not occupied either by the Spirit of God, or by good angels, or by astral influences, as the misguided heathen thought, but by evil demons, the enemies of the human race: as Tacitus said rightly in describing the institutions of the Jews; *All things are profane to them which are sacred to us.* Thus when Xerxes destroyed the images of the Greeks, he did nothing contrary to the laws of nations, although the Greek writers greatly exaggerate his acts for the sake of throwing odium upon him. For the Persians did not believe that there was any divinity in idols, but that the Sun was God, and that fire was a portion of him.

5 By the Hebrew Law, as Tacitus also rightly says, *All except the*

5 At Pompeius, eodem auctore, *templum jure victoriæ ingressus est:* aut, ut Augustinus rem eandem narrat, *non devotione supplicis, sed jure victoris:* bene ille quod templo pepercit, et rebus templi, quanquam ut Cicero diserte ait, pudore et obtrectatorum metu, non religione: male quod ingressus est, quippe contempto vero Deo, quod et Chaldæis exprobrant Prophetæ: quam etiam ob causam quidam factum arbitrantur singulari Dei providentia, ut is quem dixi Pompeius quasi in conspectu Judææ trucidaretur ad Casium Ægypti promontorium: at si spectes opinionem Romanorum, nihil in eo factum contra jus gentium. Sic idem templum excidio datum a Tito Josephus memorat, additque factum τῷ τοῦ πολέμου νόμῳ.

Ibid. c. 9.
De Civ. Dei, xviii. 45.
Pro Flacco, 28.
Dan. v. 23.
Bell. Jud. vi. 4. § 3. et c. 6. § 2.

III. Quod de sacris diximus, idem et de religiosis intelligi debet: nam hæc quoque non mortuorum sunt, sed viventium, sive populi alicujus, sive familiæ. Quare sicut sacra loca ab hostibus capta, ita et religiosa talia esse desinere scripsit dicto loco Pomponius, et Paulus jurisconsultus: *sepulcra*

L. 4. *D. de sepulc. viol.*

DII MENAGII; et Clariss. CLERICI *Indicem Philologic.* in *Historiam Philosophiæ Orientalis* a STANLEIO, voce *Statuæ.* De Religione etiam veterum Persarum THOMAS HYDE, Anglus, librum eruditissimum edidit, ubi eos ab omni idololatria absolvere conatur. *J. B.*]

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priests were excluded from the threshold of the temple. But Pompey, as the same writer relates, entered the temple by the right of victory, or, as Augustine says, *not with the devotion of a worshipper, but with the claim of a conqueror:* and he did well in sparing the temple and the things therein, although, as Cicero plainly says, not through religion, but shame and the fear of obloquy; but ill in that he entered, doing so out of contempt for the true God; as also the Chaldeans are condemned by the prophets for doing. And some think that it was on this account that, by a peculiar providence of God, Pompey was slain almost within sight of Judea, at Casius, a promontory of Egypt. But if you regard the opinion of the Romans, there was in what he did nothing contrary to the Law of Nations. So the same temple was consigned to destruction by Titus, as Josephus says, by the Laws of War.

III. What we have said of sacred places is also to be understood of burial-places; for these do not belong to the dead but the living, either a people or a family. And thus as sacred places taken by the enemy cease to be sacred, so do places of burial; as Paulus and Pomponius write: *The sepulchres of enemies are not objects of religion to us; and therefore we may convert to any use stones therein taken.*

hostium religiosa nobis non sunt, ideoque lapides inde sublatos in quemlibet usum convertere possumus: quod ita tamen intelligendum, ne ipsa mortuorum corpora male tractentur, quia id contra jus est hominum sepeliendorum, quod jure gentium introductum alibi demonstravimus.

IV. Illud hic breviter repetam, non vi sola res hostium hostibus eripi ex jure gentium, sed et dolos qui perfidia careant permissos censeri, imo et alienæ perfidiæ incitationem. Nimirum ad minora et frequentia hæc delicta ita connivere cœpit jus gentium, sicut leges civiles ad meretricium et improba fenora.

Which however is to be understood in such a way that the bodies of the dead are not to be ill-treated; for that is against the rights of burial, which is part of the Law of Nations, as we have elsewhere shewn.

IV. I will briefly again notice that by the Law of Nations, our property may not only be rescued from the enemy's hands by force, but also that deceit which involves no perfidy is allowed, and even the procurement of perfidy in others. In fact the Law of Nations has begun to connive at these smaller and frequent offenses, as the Civil Laws connive at prostitution and usury.

CAPUT VI.

DE JURE ACQUIRENDI BELLO CAPTA.

I. *Circa acquisitionem rerum bello captarum, quale jus naturæ.*

II. *Quale jus gentium: cujus testimonia adduntur.*

III. *Quando res mobilis capta censeatur ex gentium jure:*

IV. *Quando agri.*

V. *Res quæ non sunt hostium non acquiri bello.*

VI. *Quid de rebus repertis in navibus hostium?*

VII. *Jure gentium nostra fieri quæ hostes nostri aliis bello eripuerant, quod testimoniis probatur.*

VIII. *Refellitur sententia statuens res captas ab hostibus omnino singulorum capientium fieri.*

IX. *Naturaliter et possessionem et dominum per alium acquiri.*

X. *Distinctio actuum bellicorum in publicos et privatos.*

XI. *Agros acquiri populo aut ejus cujus est bellum.*

XII. *Res mobiles et se moventes actu privato captas singulorum capientium fieri;*

XIII. *Nisi lex civilis aliud statuat.*

XIV. *Captas actu publico fieri populi, aut ejus cujus est bellum:*

XV. *Arbitrium tamen in res tales aliquod solere imperatoribus concedi:*

XVI. *Qui aut res referunt ad ærarium:*

XVII. *Aut dividunt militi: et quomodo:*

XVIII. *Aut direptionem permittunt:*

XIX. *Aut aliis concedunt:*

XX. *Aut factis partibus aliud atque aliud statuunt et quomodo.*

XXI. *Peculatum circa prædam committi.*

XXII. *Lege aut alio voluntatis actu de jure hoc communi aliquid immutari posse.*

XXIII. *Sic sociis prædam concedi:*

XXIV. *Sæpe et subditis: quod variis exemplis terrestribus et maritimis illustratur.*

XXV. *Usus antedictorum.*

XXVI. *An capta extra territorium utriusque partis bellantium acquirantur belli jure.*

XXVII. *Jus hoc quod diximus quomodo belli solennis sit proprium.*

I. 1 PRÆTER quorundam actuum inter homines impunitatem, de qua egimus hactenus, est et alius effectus bello solenni ex jure gentium proprius. Ac jure naturæ qui-

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CHAPTER VI. *Of the right of acquiring things captured in War.*

I. 1 Besides the impunity of certain acts among men, which we have hitherto noticed as one of the effects of war, there is an-

dem bello justo ea nobis acquiruntur [a]quæ aut paria sunt ei quod cum nobis sit debitum aliter consequi non possumus, aut etiam quæ nocenti damnum inferunt [b]intra æquum pœnæ modum, ut alibi dictum est. Hoc jure Abrahamus de spoliis, quæ a quinque regibus acceperat, [c]decimam Deo dedit, ut historiam quæ exstat Gen. xiv. explicat divinus Scriptor ad Hebræos vii. 4, quo more Græci quoque, Carthaginienses, et Romani diis suis, ut Apollini, Herculi, Jovi Feretrio decimam de præda sacraverunt. Jacobus autem Josepho præ fratribus præcipuum relinquens legatum, *do tibi,* inquit, *partem unam supra fratres tuos, quam a manu Amorrhæi cepi gladio meo et arcu meo,* Gen. xlviii. 22. Quo in loco [d]illud *cepi* prophetico loquendi genere pro *certo capiam* sumi videtur, et Jacobo attribui, quod posteri ab ejus nomine dicti facturi erant, quasi eadem esset progenitoris et liberorum persona. Id enim rectius, quam cum Hebræis verba hæc trahere ad illam expilationem Sicimorum, quæ jam ante a filiis Jacobi facta erat: nam eam ut cum perfidia conjunctam Jacobus, pro

[a] *Quæ aut paria sunt ei quod cum nobis sit debitum aliter consequi non possumus*] Libro II. cap. vii. § 2.

[b] *Intra æquum pœnæ modum*] Libro II. cap. 20.

[c] *Decimam Deo dedit*] Et alimenta servis et partem prædæ sociis. Vide Josephum in hac historia. (*Antiq. Jud.*

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other effect peculiar to a war regular according to the Law of Nations: namely, acquisition.

By Natural Law we acquire in a just war such things as are equivalent to a debt due to us which we cannot otherwise obtain, or such things as inflict on a guilty person a reasonable measure of punishment, as we have explained elsewhere. By this right Abraham gave of the spoil which he had taken from the five kings, a tenth to God, as the narrative in Gen. xiv. is explained by the writer to the Hebrews, vii. 4. And in the same way the Greeks, the Carthaginians, and the Romans, consecrated a tenth of their booty to their gods, Apollo, Hercules, and Jupiter Feretrius. And Jacob, leaving to Joseph his legacy, says, *I give thee a portion above thy brethren which I took from the hand of the Amorite with my sword and with my bow:* Gen. xlviii. 22. In which place the word *took* seems to be used by a prophetic mode of speaking for *shall take;* and that is ascribed to Jacob which his posterity were to do: as if the progenitor and his descendants were the same person. For this is a better explanation than to refer it to the plunder of the Shechemites, which had been already perpetrated by the sons of Jacob: for that deed Jacob, as a pious man, always condemned. Gen. xxxiv. 30; xlix. 6.

sua pietate, semper improbavit, ut videre est Gen. xxxiv. 30; xlix. 6.

2 Probatum autem a Deo jus prædæ inter eos quos dixi naturales terminos aliis quoque locis apparet. Deus in lege sua, de civitate post pacem repudiatam expugnata loquens, sic ait: *Omnia ejus spolia diripies tibi: et frueris præda hostium, quam tibi Deus dederit.* Deut. xx. 14. Rubenitæ, Gaditæ, et pars Manassitarum dicuntur vicisse Ituræos et eorum vicinos, multamque prædam ab iis abstulisse, hac ratione addita, quod in bello Deum invocassent, et Deus eos propitius exaudiisset: 1 Paral. v. 20, 21, 22. quomodo et rex pius Asa narratur, Deo invocato, de Æthiopibus, injusto bello se lacessentibus, et victoriam et prædam reportasse: 2 Paral. xiv. 11, 12, 13. quod eo magis notandum, quia arma illa non ex speciali mandato, sed ex communi jure sumebantur.

3 Josue autem eosdem quos dixi Rubenitas, Gaditas, et Manassis partem secundis ominibus prosequens: Jos. xxii. 8. *participes,* inquit, *sitis prædæ hostium cum fratribus vestris.* Et David, cum ad Senatores Hebræos mitteret parta de Amalecitis spolia,

Lib. I. cap. x. § 2. *divis. Huds.*) et quæ infra cap. xvi. 3.

[d] *Illud* cepi] Chaldæus interpretatur id factum precibus ad Deum, qui singulari quadam benevolentia Sicima et Jacobo et posteris ejus conservaverit.

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2 That the right of taking booty within the natural boundaries which I have mentioned was approved by God, appears from other places also. God, in his law, speaking of a city taken after it had refused peace, says, Deut. xx. 14: *All the spoil thereof shalt thou take to thyself; and thou shalt eat the spoil of thine enemies which the Lord thy God hath given thee.* So 1 Chron. v. 20, the Reubenites, Gadites, and half tribe of Manasseh, made war upon the Hagarites and their neighbours, and took much spoil; there being added as a reason, that they cried to God in the battle and he was entreated of them. Also 2 Chron. xiv. 13, the pious king Asa is related to have cried unto the Lord, and to have conquered the Ethiopians who attacked him unjustly, and to have carried away very much spoil: which is the more to be noted, because in that case arms were not taken up by a special mandate, but on the ground of the common Laws of Nations.

3 Also Joshua, (xxii. 8) when he sent away the Reubenites, and blessed them, said, *Divide the spoil of your enemies with your brethren.* And David, (1 Sam. xxx. 26) when he sent to the Hebrew elders part of the spoil of the Amalekites, said, *Behold a present to you of the spoil of the enemies of the Lord.* Indeed as Seneca says, it is a graceful thing for a military man to enrich a friend with the spoil of

1 Sam. xxx. 26. pretium dixit muneri: *ecce donum hoc esto vobis de præda* iii. *De Benef.* 33. *hostium Domini.* Nimirum, ut Seneca dixit, militaribus viris speciosissimum est divitem aliquem spoliis hostilibus facere. Exstant et divinæ leges de præda dividenda Num. xxxi. 27. *De diris*, p. 930 A. Et Philo inter diras legis esse ait ut ager ab hostibus demetatur, unde sequi λιμὸν μὲν φίλοις, ἐχθροῖς δὲ περιουσίαν, *in suos famem, copiam hostibus.*

II. 1 Ceterum jure gentium non tantum is qui ex justa causa bellum gerit, sed et quivis in bello solenni et sine fine modoque dominus fit eorum quæ hosti eripit, eo sensu nimirum ut a gentibus omnibus et ipse et qui ab eo titulum habent, in possessione rerum talium tuendi sint: quod dominium quoad Xenoph. vii. *de Inst. Cyri*, c. 5. § 26. effectus externos licet appellare. Cyrus apud Xenophontem: νόμος ἐν πᾶσιν ἀνθρώποις ἀΐδιός ἐστιν, ὅταν πολεμούντων πόλις ἁλῷ, τῶν ἑλόντων εἶναι τὰ χρήματα· *lex est sempiterna inter homines, capta hostium urbe, eorundem res atque* *De Leg.* i. p. 626 B. Tom. II. *pecunias victori cedere.* Plato dixit: πάντα τῶν νικωμένων ἀγαθὰ τῶν νικώντων γίγνεσθαι, *bona quæ victus habuit* *Sophist.* p. 219, 222. Tom. I. *omnia victoris fieri:* qui et alibi inter genera quasi naturali acquisitionis statuit πολεμικὴν, quam et ληστικὴν, ἀγωνιστικὴν et χειρωτικὴν vocat. Assentientem hac in re habens eum quem *Comm. Soc.* iv. 11. § 15. dixi Xenophontem, apud quem Euthydemum Socrates interrogando eo perducit, ut spoliare non semper injustum fateatur, ut si in hostem id fiat.

i. *Polit.* c. 6. 2 Sed Aristotele quoque auctore ὁ νόμος ὁμολογία τις ἐστὶν, ἐν ᾧ τὰ κατὰ πόλεμον κρατούμενα τῶν κρατούντων

[e] *Apud Plutarchum in vita Alexandri*] Ibidem νικῶντας προσκτᾶσθαι καὶ τὰ τῶν πολεμίων· *vincentes etiam ea quæ hostium sunt sibi acquirere.* (Pag. 684 A.)

[f] *Ademisse se ait belli jure*] Diodorus Siculus *Excerptis Peirescianis* pag. 406. τὰ διὰ τῶν ὅπλων κτηθέντα τῷ τοῦ πολέμου νόμῳ, μὴ προέσθαι· *quæ armis quæsita essent et parta belli jure, non di-*

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an enemy. There are also divine laws concerning the division of the spoil, Num. xxxi. 27. And Philo says that it is among the curses of the law, that the land be plundered by the enemy, whence want to friends and abundance to enemies.

II. 1 But by the Laws of Nations, not only he who for just cause carries on a war, but any one, in a regular war, may without limit or measure take and appropriate what belongs to the enemy, to this effect, that both he and those who derive their title to the property from him are to be defended in possession thereof. So Xenophon and Plato say that in war all the property of the con-

εἶναί φασι, lex velut pactum quoddam commune est quo bello capta capientium sunt. Eodem respicit dictum illud Antiphanis: ὅτι τοῖς πολεμίοις εὔχεσθαι δεῖ τἀγαθὰ παρεῖναι χωρὶς ἀνδρείας. γίνεται γὰρ οὕτως οὐ τῶν ἐχόντων, ἀλλὰ τῶν κρατούντων· *optandum ut hostibus bona adsint sine virtute: sic enim fiunt illa non eorum qui habent, sed eorum qui capiunt.* [c]Apud Plutarchum in vita Alexandri τὰ τῶν ἡττωμένων εἶναί τε δεῖ καὶ προσαγορεύεσθαι τοῦ κρατοῦντος, *ea quæ victi fuerant, et esse et appellari debent victoris.* Idem alibi: τὰ τῶν ἡττωμένων ἐν ταῖς μάχαις ἀγαθά, τοῖς νικῶσιν ἆθλα πρόκειται· quæ verba sunt ex Xenophonte secundo de Cyri institutione. Philippus in epistola ad Athenienses: πάντες τὰς πόλεις οἰκοῦμεν ἢ τῶν προγόνων παραδόντων, ἢ κατὰ πόλεμον κύριοι καταστάντες· *omnes tenemus oppida a majoribus relicta, aut possessa belli jure.* Æschines: εἰ μὲν πρὸς ἡμᾶς πολεμήσας δοριάλωτον τὴν πόλιν εἷλες, κυρίως ἔχεις τῷ τοῦ πολέμου νόμῳ κτησάμενος· *si bello in nos suscepto armis cepisti urbem, jure eam possides belli lege.*

[Dictum illud non est Antiphanis, sed Antisthenis apud Stobæum, *Serm.* lii. p. 365. *J. B.*] Pag. 676 A. Cap. 3. § 2. Ap. Demost. p. 64 B. *De male obita legatione*, p. 251 B.

3 Marcellus apud Livium quæ ademit Syracusanis [f]ademisse se ait belli jure. Romani legati Philippo de Thraciæ et aliis civitatibus dicebant, si Philippus bello cepisset, eas præmium victoriæ belli jure habiturum: et Masinissa quem agrum pater suus Carthaginiensibus bello ademisset, habere se jure gentium aiebat. Sic et apud Justinum Mithridates: *non Cappadocia filium eductum quam jure gentium victor occu-*

Lib. xxvi. 31. *Idem*, xxxix. 29. Liv. xl. 17. Lib. xxxviii. 5.

mittenda. Gotthi apud Agathiam Lib. I. de Theuderico rege, postquam is Odoacrum vicerat, τἀκείνου πάντα κατέσχε τοῦ πολέμου νόμῳ· *quæ ejus fuerant omnia tenuit belli jure.* [Pag. 11. *Ed. Vulcan.* ubi legitur, πολέμου θεσμῷ, non νόμῳ.]

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quered becomes the right of the conqueror: and the latter in another place enumerates among the natural modes of acquisition that by war, contest, or strong hand; and in this Xenophon agrees with him, as where Euthydemus is made to allow that it is not unjust to despoil an enemy.

2 So Aristotle says the law is a sort of convention by which what is taken in war becomes the property of the captors. So Antiphanes, Plutarch, Xenophon, Philip, Eschines.

3 Marcellus in Livy speaks of what he took from the Syracusans as taken by the laws of war. So the Romans to Philip, Masinissa, Mithridates in Justin, Cicero, of Mitylene. So he says, that private

II. Contr. Rull. c. 16. *paverat.* Cicero Mitylenas ait populi Romani factas, belli lege ac jure victoriæ. Idem privata aliqua esse cœpisse ait, Offic. i. 7. aut occupatione vacuorum aut bello, eorum scilicet qui victoria Lib. xli. sub fin. potiti sunt. Dion Cassius: τὰ τῶν ἡττημένων τοῖς κρατοῦσι Strom. i. 23. προσγίνεται. Etiam Clemens Alexandrinus ait res hostium rapi et acquiri belli jure.

4 *Quæ ex hostibus capiuntur jure gentium statim capi-* L. 5. § ult. D. de acq. rerum dom. Inst. tit. de rer. divis. § 17. Lib. ii. Tit. 1. § 17. Arist. i. de Rep. c. 8. *entium fiunt,* ait Caius jurisconsultus. Naturalem hanc acquisitionem φυσικὴν κτῆσιν appellat Theophilus in Græcis Institutionibus, sicut et Aristoteles dixerat πολεμικὴν φύσει κτητικὴν, *rem militarem secum ferre naturalem aquirendi modum.* Nimirum quia non causa aliqua sed ipsum nudum factum spectatur, et ex eo jus nascitur: sicut et Nerva filius, L. 1. § 1. D. de acq. poss. referente Paulo jurisconsulto, dominium rerum ex naturali possessione cœpisse aiebat, ejusque rei vestigium remanere de his quæ terra, mari, cœloque capiuntur; item de bello captis, quæ omnia protinus eorum fiunt, qui primi possessionem apprehenderunt.

5 Hosti autem eripi censentur et quæ subditis hostium Hist. Gr. iii. 1. § 23. eripiuntur. Sic Dercyllides argumentatur apud Xenophontem, cum Pharnabazus hostis esset Lacedæmoniorum, Mania autem subdita Pharnabazo, Maniæ bona in ea esse causa ut a se jure belli recte occupentur.

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property began when men took possession of what was vacant, or won it in war. So Dio Cassius, and Clemens Alexandrinus.

4 *What is taken from the enemy becomes the property of the captor,* says Caius the Jurist. This Theophilus calls *natural acquisition;* so Aristotle. For in this case the naked fact of possession is looked at, and right arises from that. So Nerva, as Paulus quotes him, said that ownership arises from natural possession; and that a vestige of this right appears in things which are taken in hunting, and also in war, which forthwith are the property of the captors.

5 Those things are supposed to be taken from the enemy which are taken from his subjects. So Dercyllides reasons in Xenophon, that since Pharnabazus is the enemy of the Lacedæmonians, and Manias the subject of Pharnabazus, the goods of Manias are in a condition in which they may be fairly captured as prize of war.

III. 1 But in this question of war, it has been established as a rule of nations, that he is understood to have captured a thing who detains it in such a manner that the other has lost probable hope of recovering it; or so that the thing has escaped from his grasp, as Pomponius says. And in moveables, this is applied so that things are con-

III. 1 Ceterum in hac belli quæstione placuit gentibus, ut cepisse rem is intelligatur, qui ita detinet, ut recuperandi spem probabilem alter amiserit, aut ut res persecutionem effugerit, ut loquitur in simili quæstione Pomponius. Hoc autem in *L. 44. D. de acq. rer. dom.* rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id est, præsidia hostium perducta fuerint. Eodem enim modo *L. 19. § 3. D. de capt. l. ult. ibid.* res amittitur, quo postliminio redit. Redit autem ubi intra fines imperii esse cœpit, quod alibi explicatur intra præsidia. *L. 5. § 1. d. tit.* Imo et aperte Paulus de homine dixit, amitti eum ubi fines nostros excessit: et Pomponius captum bello explicat eum, quem hostes ex nostris ceperunt, et intra præsidia sua perduxerunt: antequam enim in præsidia perducatur hostium, manere civem.

2 Hominis autem et rei, in hoc gentium jure, eadem fuit ratio. Unde facile intellectu est quod alibi dicuntur capta statim capientium fieri cum conditione aliqua, continuandæ scilicet *Inst. de rer. div. § 17. L. 5. § 7. D. de acq. rer. dom.* eo usque possessionis, debere intelligi. Cui consequens esse videtur, ut in mari naves et res aliæ captæ censeantur tum demum, cum in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perducta sunt: nam tunc desperari incipit recuperatio: sed recentiori jure gentium inter Europæos po-

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sidered as captured when they are brought within the boundaries, or *intra præsidia*, under the protection of the enemy. A thing is lost in the same way in which it is recovered by postliminium: and it is recovered when it comes again within the boundaries of the empire, which is elsewhere explained as *intra præsidia*. Indeed Paulus expressly says of a man, that he is lost when he goes out of our boundaries; and Pomponius explains a man taken in war to be one of ours whom the enemy has taken and brought *intra præsidia sua:* and that till then he is a citizen.

2 A man and a thing in this part of the Law of Nations are under the same rule. Hence it is to be understood that when it is said that things captured forthwith become the property of the captors, is to be understood with a certain condition, namely, that the possession continues till they are thus brought *intra præsidia*. Whence it seems to follow that at sea, ships and other things captured are understood to be captured when, and not till, they are brought into dock or harbour, or to the place where the fleet is; for then recovery becomes desperate. But we find that it has been established by the more recent law of nations among Europeans that such things are understood to be captured when they have been twenty-four hours in the possession of the enemy.

Consul. mar. c. 283. et 287. Const. Gallic. Lib. xx. tit. 13. art. 124. Corn. de Lapid. in Gen. xiv. Molin. disp. 118.

pulos introductum videmus, ut talia capta censeantur ubi [g] per horas viginti quatuor in potestate hostium fuerint.

L. 18. D. de acq. vel amitt. poss.

IV. 1 At agri non statim capti intelliguntur simul atque insessi sunt: nam quamquam verum est eam agri partem quam cum magna vi ingressus est exercitus ab eo interim possideri, ut a Celso notatum est; tamen ad eum quem tractamus effectum non sufficit qualiscunque possessio, sed firma requiritur. Itaque Romani agrum extra portam, quem Annibal castris insidebat, adeo non amissum judicabant, ut eo ipso tempore nihilo minoris venierit quam ante venisset. Is ergo demum ager captus censebitur, qui mansuris munitionibus ita includitur, ut nisi iis expugnatis parti alteri palam aditus non sit.

Liv. xxvi. 11.

2 Et hæc non minus probabilis videtur nominis territorii origo a terrendis hostibus a Siculo Flacco allata, quam illa Varronis a terendo, aut Frontini [1] a terra, aut Pomponii juris-

Pag. 3.

De Ling. Lat. iv. p. 9.

[g] *Per horas viginti quatuor*] Etiam terra id observari discas e Thuano libro cxiii. in anno cIↄ Iↄ xcv. Ex Germanicis legibus id venit, ad exemplum ejus quod de fera vulnerata constitutum apud ipsos non sine ratione fuerat, ut *lege Langobardorum* Lib. i. tit. xxii. § 6. Idem in Anglia et Castellæ regno servari ait Albericus Gentilis Hispanicæ advocationis l. 3 ⟦c. Bynkershoek, *Q. F. Publ.* i. 4. *J. B.*⟧

[1] Frontinus, non a *terra*, sed a *terrendo*, quemadmodum Siculus Flaccus vocem *Territorii* deducit. Verum Cujacius etymologiam illam a *terra* petitam proposuit in Nota ad *L.* 53. *C. De Decurionibus* &c. quam observationem quum Auctor vidisset a Dionysio Gothofredo, ad *L.* 239. *D. De Verb. Signif.* ita relatam: *A terrendis hostibus* [etymon deducit] *Frontinus in libro* de agrorum qualitat. *a terra, Cujac. ad l.* 53. *C. de Decurion.* existimavit, dum festinanter legeret, voces *a terra* referri

IV. 1 But lands are not understood to be captured as soon as they are occupied. For though it be true that the part of the land which an army has entered upon with a great force is for the time in its possession, as Celsus notes; yet for the effect of which we speak, possession of every kind is not sufficient, but firm possession is required. Thus the Romans were so far from judging the land on which Annibal had planted his camp to be lost, that at that very time it sold for no less than it had sold for before. That land then is conceived to be captured, and no other, which is included in permanent defenses, so that it is evident there is no access to it till these are carried.

2 And this origin of the word *territory, a terrendis hostibus,* from terrifying the enemies from it, given by Siculus Flaccus, appears no less probable than that given by Varro, *a terendo,* from ploughing it; or that of Frontinus*, from *terra,* the land; or that of Pomponius the jurist, from the right which the magistrates had

* Frontinus is here misquoted: see Barbeyrac.

consulti a terrendi jure quod habent magistratus. Sic Xenophon libro de vectigalibus, agri possessionem belli tempore ait retineri per munimenta quæ τείχη καὶ ἐρύματα ipse appellat. Cap. 4. §§ 43, 44.

V. Liquet et hoc, ut res aliqua nostra belli jure fiat requiri ut hostium fuerit: nam quæ res apud hostes quidem sunt, puta in oppidis eorum aut intra præsidia, sed quorum domini nec hostium sint subditi, nec hostilis animi, eæ bello acquiri non possunt, ut inter cetera Æschinis dicto jam loco ostenditur Amphipolim, quæ urbs esset Atheniensium, Philippi bello in Amphipolitanos ipsius Philippi non potuisse fieri. Nam et ratio deficit, et jus hoc mutandi per vim dominii odiosius est, quam ut produci debeat. *Orat. de male obit. leg.* p. 251 B.

VI. Quare quod dici solet [h] hostiles censeri res in hostium navibus repertas, non ita accipi debet quasi certa sit juris gentium lex, sed ut præsumtionem quandam indicet, quæ *Cons. maris.* c. 273.

ad *Frontinum*, de quo ante, non ad Cujacium, qui sequitur. *J. B.*

[h] *Hostiles censeri res in hostium navibus repertas*] Sed neque amicorum naves in prædam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navis. l. cotem. 11. D. *de publicanis* § 2. Rodericus Zuarius libro *de usu maris* consilio 11. num. 6. Atque ita interpretandas puto leges Galliæ, quæ ex rebus naves, ex navibus res prædæ subjiciunt, quales sunt Francisci I. datæ anno cIↄ Iↄxliii. cap. 42. Henrici III. anno cIↄ Iↄlxxxiv. mense Martio, capite 69. *lex Portugallica* libro i. tit. xviii. Alioqui res ipsæ solæ in prædam veniunt. Meursius *Danicorum* libro ii. Sic bello Venetorum cum Genuensibus pertentatæ Græcorum naves, et extracti si qui hostium laterent, Gregoras libro ix. (pag. 188.) vide et Crantzium *Saxonicorum* ii. et Albericum Gentilem advocationis Hispanicæ l. 20 [cf. Heineccii diss. de navibus ob vecturam vetitarum

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terrendi, of going out with the lictors before them (Gronov.). So Xenophon says that possession in the time of war is held by muniments.

V. This also is plain, that in order that a thing may become ours by the right of war, it is requisite that it should have belonged to the enemy. The things which are in the hands of the enemy, as in their houses or under their protection, but of which the owners are neither subjects of the enemy nor hostile in intention, cannot be acquired by war; as Eschines shews that Amphipolis, which city belonged to the Athenians, could not become the property of Philip by his war against the Amphipolitans. For the reason why it should do so is wanting; and this right of changing the ownership by mere force is too odious to be extended beyond the strict meaning of the rule.

VI. Wherefore what is said, that goods found in enemies' ships are to be treated as enemies' goods, ought not to be accepted as a settled rule of the Law of Nations, but as indicating a certain presumption which may be rebutted by valid proofs to the contrary. And so it was

tamen validis in contrarium probationibus possit elidi. Atque ita in Hollandia nostra jam olim, anno scilicet cIↃ CCC XXXIII flagrante cum Ansiaticis bello, frequenti senatu judicatum, et ex judicato in legem transiisse comperi.

VII. 1 Illud vero extra controversiam est, si jus gentium respicimus, quæ hostibus per nos erepta sunt, ea non posse vindicari ab his qui ante hostes nostros ea possederant et bello amiserant: quia jus gentium hostes primum dominos fecit dominio externo, deinde nos: quo jure inter alia tuetur se Jephthes contra Ammonitas, quia ager ille quem Ammonitæ vindicabant belli jure ab Ammonitis, ut et pars alia a Moabitis ad Amoræos, ab Amoræis ad Hebræos transiisset. [i]Sic et David quod ipse Amalecitis, Amalecitæ antea Palæstinis eripuerant, pro suo habet ac dividit.

Jud. xi. 23, 24, 27.

1 *Sam.* xxx. 18, 20.

Lib. vi. 36.

2 Titus Largius apud Dionysium Halicarnassensem in senatu Romano [k]cum Volsci olim possessa repeterent, sententiam sic dixit: *ὅτι Ῥωμαῖοι καλλίστας ὑπολαμβάνομεν κτήσεις εἶναι καὶ δικαιοτάτας, ἃς κατάσχωμεν πολέμῳ λαβόντες καὶ νόμῳ, καὶ οὐκ ἂν ὑπομείναιμεν μωρίᾳ τὴν ἀρετὴν ἀφανίσαι, παραδόντες αὐτὰς τοῖς ἀπολωλεκόσι. κοινωνητέον τε πᾶσι καὶ τοῖς ἐκ τούτων γενομένοις καταλιπεῖν ἀγωνιούμεθα· νῦν δὲ ὑπαρχόντων ἤδη στερησόμεθα, καὶ ἑαυτοὺς ὅσα πολεμίους βλάψομεν. Romani nos honestissimas eas atque justissimas credimus possessiones, quas belli lege captas habemus: neque vero induci possumus ut stulta facilitate deleamus virtutis monumenta, si eas illis reddamus quibus*

mercium commissis cap. 2, § 9 inter ejus opuscula exerc. 8 et Bynkershoek, *Q. F. Publ.* i. 14. *J. B.*]

[i] *Sic et David*] Sic Resin rex Syriæ Elotham urbem, quæ Idumæorum fuerat, non Idumæis sed Syris tradidit habitandam, secundum lectionem Masoreticam II. Reg. xvi. 6. [Sed lectio illa vitiosa est. Vide ibi Clariss. Clerici Notam. *J. B.*]

[k] *Cum Volsci*] De Veiis idem in Romulo narrat Plutarchus: *Οὐήϊοι ἀρχὴν ἐποιήσαντο πολέμου φιδήνας ἀπαιτεῖν ὡς προσήκουσαν αὐτοῖς. τὸ δ' οὐκ ἄδι-*

judged in full senate by our Hollanders in 1333, when a war was raging with the Hanse towns; and the judgment has become law.

VII. 1 But this is beyond controversy, if we look at the Laws of Nations, that those things which we take from our enemies cannot be reclaimed by those who possessed them before the enemy, and lost them in war; because the law of nations first made them owners *prima facie*, and then us. And on this ground, among others, Jephtha defends himself against the Ammonites, because the land which the Ammonites claimed had passed by the law of war from the Ammonites, as also

semel perierunt. Imo vero tales possessiones non tantum cum his qui nunc vivunt civibus nostris communicandas, sed et posteris relinquendas censemus: tantum abest ut parta relinquendo in nos ipsos ea constituamus quæ in hostes constitui solent: et in responso Romanorum Auruncis dato: Lib. vi. 32. ἡμεῖς οἱ Ῥωμαῖοι δικαιοῦμεν ὅσα κτᾶταί τις ἀρετῇ πολεμίους ἀφελόμενος, ταῦτα τοῖς ἐγγόνοις ὡς οἰκεῖα παραδιδόναι· *nos Romani ita arbitramur, quæ quis hostibus erepta virtute quæsivit, ut optimo jure propria ad posteros transmitti.* Alibi in responso ad Volscos sic Romani: ἡμεῖς δὲ κρατίστας Lib. viii. 10. ἡγούμεθα κτήσεις ἃς ἂν πολέμῳ κρατήσαντες λάβωμεν· οὔτε πρῶτοι καταστησάμενοι νόμον τόνδε, οὔτε αὐτὸν ἀνθρώπων ἡγούμενοι εἶναι μᾶλλον ἢ οὐχὶ θεῶν, ἅπαντάς τε καὶ Ἕλληνας καὶ βαρβάρους εἰδότες αὐτῷ χρωμένους, οὐκ ἂν ἐνδοίημεν ὑμῖν μαλακὸν οὐδὲν, οὐδ' ἂν ἀποσταίημεν ἔτι τῶν δορυκτήτων. πολλὴ γὰρ ἂν εἴη κακότης, εἴ τις ἃ μετὰ ἀρετῆς καὶ ἀνδρείας ἐκτήσατο, ταῦτα ὑπὸ δειλίας τε καὶ μωρίας ἀφαιρεθείη· *Nos autem optimum judicamus possessionis genus, quod belli jure captum quæsitumque est. Cumque non a nobis hoc jus sit institutum, sed a Diis verius quam ab hominibus profectum, omniumque gentium tam Græcarum quam barbararum usu probatum, nihil vobis per ignaviam concedemus, nec bello partis absistemus. Maximum enim id probrum foret, quæ virtute ac fortitudine quæsita sunt, ea per formidinem aut stuporem amittere.* Sic et in responso Samnitum: πολέμῳ κρατησάντων ἡμῶν, ὅπερ ἐστὶ νόμος In exc. legat. p. 705.

κον ἦν μόνον, ἀλλὰ καὶ γελοῖον ὅτι κινδυνεύουσι τότε καὶ πολεμουμένοις οὐ προσαμύναντες, ἀλλ' ἐάσαντες ἀπολέσθαι τοὺς ἄνδρας, οἰκίας καὶ γῆν ἀπαιτοῖεν, ἄλλων ἐχόντων· *Veii principium belli faciebant postulationem ut Fidenæ ipsis redderentur, velut ad quos pertinerent: verum id non injustum modo erat sed et ridiculum, ut qui periclitantibus bellumque gerentibus non subvenissent, sed ipsos homines sivissent perire, nunc domos et agros a bello possidentibus vindicarent.* [Pag. 33 B. Verum hoc exemplum, ut et illud Volscorum,

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another part from the Moabites to the Amorites, and from the Amorites to the Hebrews. So David takes as his own and divides what he had taken from the Amalekites, and the Amalekites before from the Philistines.

2 Titus Largius, when the Volsci reclaimed in the Roman Senate what they had formerly possessed, declared that the Romans held the right of possession of land by conquest to be good, and would not recede from it. So the Romans in their answer to the Aurunci; and again to the Volsci; and to the Samnites.

κτήσεως δικαιότατος· *cum armis hæc quæsierimus, quæ lex acquirendi justissima est.*

Lib. xli. 17.

3 Livius, cum narrasset agrum prope Lunam a Romanis divisum, eum agrum sic notat: *de Ligure captus is ager fuerat: Etruscorum antequam Ligurum fuerat.* Hoc jure a Romanis retentam Syriam Appianus notat, nec redditam Antiocho Pio, [1] cui eam eripuerat Tigranes hostis Romanorum: et Justinus, ex Trogo sic respondentem facit eidem Antiocho Pompeium, *ut habenti regnum non ademerit, ita quo cesserit Tigrani, non daturum quod tueri nesciat.* Sed et eas [m] Galliæ partes, quas Gallis eripuerant Cimbri, Romani pro suis habuere.

Mithrid p. 244. — Lib. xl. 2. — App. *Bell Civ.* i. p. 367.

VIII. Gravior disputatio est, cui in bello publico ac solenni res hostium acquiratur, ipsine populo an singulis qui de populo aut in populo sunt. Valde enim hic variant recentiores juris interpretes: quorum plerique cum in jure Romano legissent capta capientium fieri, in canonum autem corpore distribui

Bart. *ad l.* 28. *D. de capt. Alex. et* Jas. *l.* 1. *D. de acq. poss. Ang. ad* § 17. *inst. de rer. div. Pan. ad c. sicut. de Jurejur.* n. 7. Th. Gram. *decis. Neap.* 71. n. 17. Mart. *Laud. de bello* q. 4.

non huc convenit; ut expendenti patebit, et nos in Notis Gallicis ostendimus. *J. B.*]

[1] *Cui eam eripuerat Tigranes*] Appianus sic: ὅτι τοὺς Σελευκίδας ὑπὸ τοῦ Τιγράνους ἐκπεσόντας οὐκ εἰκὸς ἦν ἔτι Συρίας ἄρχειν, μᾶλλον ἢ Ῥωμαίους Τιγράνην νενικηκότας· *non æquum esse Seleucidas a Tigrane ejectos potius Syriam tenere, quam victores Tigranis Romanos.* (*Bell. Syr.* pag. 191.) Et alibi: ἡγούμενος τὸν κρατήσαντα Ἀντιόχου τῆς γῆς ἀπελάσας Ῥωμαίοις αὐτὴν κατὰ τόδε προσεκτῆσθαι· *credebat se cum victorem Antiochi ea terra expulisset, hoc ipso eam terram acquisivisse Romanis.* (*Bell. Mithrid.* pag. 404.) Ipse Antiochus apud Polybium in excerptis legationum num. 72: ἡγούμενος τὴν κατὰ πόλεμον ἰσχυροτάτην

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3 Livy, after relating that the land near Luna was divided by the Romans, remarks, *This land had been taken from the Ligurians, and had at a still previous period belonged to the Etruscans.* On this ground they retained Syria, and did not restore it to Antiochus Pius, from whom Tigranes, an enemy of the Romans, had won it. And so Pompey replied to the same Antiochus [Antiochus Magnus, *J. B.*], that *he had not taken it from him, and would not give him what he did not know how to defend.* So those parts of Gaul which the Cimbri had taken from the Gauls, the Romans kept as their own.

VIII. It is a more serious question, who becomes the owner of things of the enemy taken in a public and regular war; whether the people itself, or particular persons of the people, or in the people. On this point the recent interpreters of the law greatly vary. The greater part of them, having read in the Roman Law that things captured become the property of the captors, and in the body of canons, that the booty was distributed by public order, have followed one another, as is usual in such cases; and have said that in the first place, and by

prædam publico arbitrio, alii post alios, ut fieri solet, dixerunt, primo ac jure ipso fieri capta singulorum qui manu capiunt, attamen duci assignanda qui inter milites distribuat: quæ sententia cum recepta non minus quam falsa sit, hoc accuratius a nobis refutanda est, ut specimen sit quam parum tuto in hoc controversiarum genere tali auctoritati credatur. Enimvero dubitandum non est quin gentium consensu utrumvis potuerit constitui, aut ut capta populo bellum gerenti, aut ut cuivis qui manu caperet in dominium cederent. Sed quid voluerint quærimus, et dicimus gentibus placuisse, [2] ut res hostium hostibus essent non alio loco quam quo sunt res nullius, ut ex Nervæ filii dicto jam antea apertum fecimus.

IX. 1 At res quæ nullius sunt fiunt quidem capientium, sed tam eorum qui per alios, quam qui per se capiunt. Ita non servi tantum aut filii, sed et liberi homines qui in piscando, aucupando, venando, margaritas legendo operam suam addixerunt aliis, statim quod acceperunt acquirunt ipsis quibus

καὶ καλλίστην εἶναι κτῆσιν· *arbitrabatur eam quæ bello fieret firmissimam et honestissimam esse possessionem.* [Confundit heic Auctor duos Antiochos. Ille enim, de quo apud POLYBIUM, non est Antiochus Pius, sed Antiochus cui Magno cognomen erat. *J. B.*]

m *Galliæ partes*] Franci agros Italiæ a Gotthis acceptos Romanis non reddiderunt. Procopius *Gotthicorum* IV. (cap. 24.) vide quæ dicit rex Suediæ apud Thuanum libro LXXVI. in anno CIↃIↃ LXXXII.

[2] Non hæc est quæstio Juris Gentium, quomodocumque Jus illud intelligatur, sed Juris Civilis, aut Juris Publici, singulorum Populorum. Diximus in Notis nostris Gallicis. *J. B.*

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law, the captures become the booty of the persons who actually take them, but that they are to be assigned to the general to distribute among the soldiers. As this opinion, though generally received, is false, it must be carefully refuted by us, as a specimen how little safety there is in such authority on such subjects. For it cannot be doubted that by the consent of nations either rule might be established; that captures might go, either to the people which makes the war, or to the individuals who actually take them. But we inquire what they really have established, and we say that they have ruled that the property of enemies should be, for enemies, in the same condition as *res nullius*, that which is no one's property, as we have already explained from the dictum of Nerva (§ II. Art. 4).

IX. 1 Now *res nullius* do indeed become the property of those who take them, but of those who take them by the agency of others, as well as by their own. Thus, not slaves only, or sons who are under their fathers, but also free men, if they work for others in fishing, fowling, hunting, pearl-fishing, acquire their captures for those who

L. 53. D. de acq. dom. operam navant. Modestinus jurisconsultus recte dixit: *quod naturaliter acquiritur, sicuti est possessio, per quemlibet vo-* Lib. v. tit. 2. § 1. *lentibus nobis possidere acquirimus:* et Paulus receptis sententiis: *possessionem acquirimus animo et corpore: animo* L. 1. § 20. D. de acq. poss. *utique nostro, corpore vel nostro, vel alieno.* Idem ad edictum: *per procuratorem, tutorem curatoremve possessio nobis acquiritur*, quod explicat si id ea mente faciant ut operam nobis accommodent. Sic apud Græcos, qui in Olympiis certabant præmia [3]acquirebant iis a quibus mittebantur. Ratio est, quia naturaliter homo hominis alterius volens volentis instrumentum est, ut et alibi diximus.

2 Quare discrimen quod traditur inter liberas personas L. 56. D. de obligat. et act. L. 38. § 17. de verb. oblig. et serviles circa acquisitiones, juris est civilis et ad civiles acquisitiones proprie pertinet, ut ex dicto Modestini loco apparet: et tamen has ipsas Severus Imperator postea ad naturalium L. 1. C. de adq. et ret. poss. exemplum admovit propius, non utilitatis tantum, ut ipse profitetur, ratione, sed et jurisprudentiæ. Semoto ergo civili C. Pot. 68. et c. qui facit, 72. De Reg. Jur. jure, locum habet quod dicitur per alium facere quem posse quod per se ipsum potest, et perinde esse per se quis faciat an per alium.

[3] Vide hac de re PETRI FABRI *Agonistic.* Lib. I. cap. 3. pag. 14, 15. et cap. 26. p. 170. *Ed. Lugd. J. B.*

[4] At in omni Bello Publico, totum jus Privatorum, quantum quantum est, oritur ex Populi, aut Principis, consensu expresso vel tacito: adeoque distinctio ista non satis firmo fundamento nititur, ut jam observarunt Interpretes. adde Bynkershoek, *Q. T. Publ.* I. 20 in

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employ them. So Modestinus says that *the possession which we can acquire by natural law, we may acquire by any one whom we appoint:* and Paulus, in a well known maxim: *We acquire possession by bodily or mental act: the mental act is our own; the bodily act may be ours or another's;* which he explains to mean, if others give their labour to us. Thus, among the Greeks, the prizes at the Olympian Games were gained by those who sent the combatants. The reason is, that by Natural Law, a man who wills it, may be the instrument of another who wills it, as we have elsewhere said.

2 Wherefore the distinction which is delivered between free persons and servile, as to acquisitions, belongs to the Civil Law, and properly pertains to civil acquisitions, as appears from the passage quoted from Modestinus. And even these civil acquisitions, the emperor Severus afterwards brought nearer to the example of natural acquisitions, not only for the sake of utility, as he professes, but also of jurisprudence. Hence, setting aside Civil Law, the rule holds, that what a person can do by himself he may do by another, and it is the same thing whether he do it by himself or by another.

X. Distinguendum ergo in nostro negotio inter actus vere [4]publicos belli, et inter actus privatos qui fiunt occasione belli publici: per hos actus privatis res quæritur primo ac directe: per illos actus populo. Ex hoc gentium jure Scipio agit cum Masinissa apud Livium: *Syphax populi Romani auspiciis victus captusque est. Itaque ipse, conjux, regnum, ager, oppida, homines qui incolunt, quicquid denique Syphacis fuit, præda populi Romani est.* Nec aliter Antiochus Magnus argumentabatur Cœlen Syriam Seleuci factam non Ptolemæi, eo quod Seleuci bellum fuisset, cui Ptolemæus navasset operam. Historia est apud Polybium quinto.

Lib. xxx. 14.

Cap. 67.

XI. 1 Res soli nisi publico actu, inducto exercitu, impositis præsidiis, capi non solent: ideo ut respondit Pomponius, *publicatur ager qui ex hostibus captus sit*, id est, ut ibidem exponit, *prædæ non cedit*: prædæ nomine stricte accepto. Salomo prætorii præfectus [n]apud Procopium: *ὡς τὰ μὲν ἀνδράποδα καὶ τὰ ἄλλα πάντα χρήματα τοῖς στρατιώταις εἰς λάφυρα ἰέναι, οὐκ ἀπεικὸς εἶναι· Γῆν μέν τοι αὐτὴν βασιλεῖ τε καὶ τῇ Ῥωμαίων ἀρχῇ προσήκειν· captivos sane et res alias militibus prædæ loco cedere ratione non caret*: (accipiendum hoc ut fiat publico concessu, quemadmodum infra ex-

L. 20. D. De Capt. et postliminio.

fine. *J. B.*

[n] *Apud Procopium*] *Vandalicorum* II. (cap. 14.) vide et ibi sequentia. Etiam Severus sola ab hostibus capta limitaneis ducibus et militibus donavit. Lampridius notat, (cap. 58.) In fœdere Helvetico est ut oppida et arces captæ communitati pagorum cedant: apud Simlerum multis locis.

X. But in our question, we must distinguish between acts really public done in a war, and private acts done on the occasion of a public war: and by these private acts, things are acquired by private persons primarily and directly; by those public acts, they are acquired to the public. And by this law of nations Scipio deals with Masinissa: *Syphax was conquered and taken under the auspices of the Roman people; therefore he and all that was his is the booty of the Roman people.* In the same way Antiochus the Great argued that Cœle-Syria became the property of Seleucus, not of Ptolemy, because the war was the war of Seleucus, and Ptolemy had only acted as an auxiliary.

XI. 1 Landed property cannot be taken except by a public act, by leading in an army, and establishing strong places. Therefore, as Pomponius gave his opinion: *Land which is taken from an enemy becomes public property*: that is, as he explains, does not become private booty. So Salomo the *præfectus prætorii* said: *That captives and other things should become private booty is not unreasonable*, (that is, if it

ponemus) *agros autem ad principem et imperium Romanum pertinere.*

2 Sic [o]apud Hebræos et [5]Lacedæmonios ager manu captus sortito divisus est. Sic Romani captos agros aut locandos retinuerunt, interdum modico veteri possessori honoris gratia relicto, aut distraxerunt, aut assignarunt colonis, aut fecerunt vectigales: quarum rerum passim in legibus, historiis, et agrimensorum commentariis testimonia exstant. Appianus libro primo belli civilis: Ῥωμαῖοι τὴν Ἰταλίαν πολέμῳ χειρούμενοι, γῆς μέρος ἐλάμβανον· *Romani cum Italiam armis subegissent, victos parte agri mulctarunt:* et secundo libro: τῶν δὲ πολεμίων ὅτε κρατήσαιεν, οὐδὲ τούτων ἅπασαν τὴν γῆν ἀφῃροῦντο, ἀλλ' ἐμερίζοντο· *etiam victis hostibus terram non omnem adimebant, sed partiebantur.* Notat Cicero, *Oratione pro Domo sua* ad Pontifices, consecratos interdum ab Imperatore agros de hostibus captos, sed populi jussu.

L. 11. D. de eviction. L. 15. § 1. de rei vind.

Pag. 353.

Pag. 516.

Cap. 49.

XII. 1 At res mobiles et se moventes aut in ministerio publico capiuntur, aut extra illud. Si extra ministerium publicum, fiunt singulorum [6]capientium. Et huc referendum est

[o] *Apud Hebræos*] Apud eosdem de agro qui bello captus esset rex tantum ferebat quantum singulæ tribus: notatum id *Digestis Thalmudicis,* titulo *de rege.*

[5] Fallor, an Auctor noster heic Lacedæmonios dixit, pro Atheniensibus. Nihil tale de Lacedæmoniis reperio, nec apud eos qui ex professo res et mores illorum exposuerunt, nec in *Tractatu Historico et Theologico de natura et usu Sortium,* Anglice scripto a Thoma Gatakero, Viro diffusæ admodum lectionis, qui cap. iv. illius libri studiose omnia collegit ex Antiquitate, quæ pertinebant ad divisionem agrorum sortito

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be done by the public consent,) *but land belongs to the prince and people of Rome.*

2 So among the Hebrews and Lacedæmonians [*Qu.* Athenians, *J. B.*], land taken in war was divided by lot. So the Romans, when they took land in war, either kept it and let it for rent, sometimes leaving a small portion to the ancient possessor, *honoris gratia;* or sold it; or assigned it to settlers; or imposed a ground-rent upon it; as we have perpetual evidence in the laws, and histories, and in the commentaries of the *agrimensores.* So Appian. Cicero, in his *Oratio pro Domo sua,* notes that sometimes lands taken from the enemy were consecrated by the Imperator, but by order of the People.

XII. 1 Things moveable and self-moving are either taken in the public service or extraneously to it. If extraneously to it, they are the property of the individual captors. To this we must refer what Celsus says, *The things which, belonging to the enemy, are in our hands, are not public property, but the property of those who take possession:*

Celsi illud: *quæ res hostiles apud nos sunt, non publicæ sed occupantium fiunt.* Quæ apud nos sunt, id est, bello orto apud nos deprehenduntur. Nam idem et in hominibus observabatur, quo tempore homines hac in parte rebus captis accensebantur. Insignis est in eam rem Tryphonini locus: *verum in pace qui pervenerunt ad alteros, si bellum subito exarsisset, eorum servi efficiuntur apud quos jam hostes suo fato* (ita legendum, [7]non *facto* aut *pacto*, ut habent libri) *deprehenduntur.* Fato hoc asscribit jurisconsultus, quia [p]nullo suo merito in servitutem deveniunt: nam talia fato asscribere tralatitium est. Tale illud Nævii: *fato fiunt Romæ Metelli consules,* id est, sine suo merito.

L. 51. § 1. D. *de rer. acq. dom.*

L. *in bell.* 12. *princ. D. de capt. et post.*

Apud Ascon. *Pedian. Act.* I. *in Verr.* c. 10.

2 Indidem venit quod si quid milites capiunt non in procinctu, aut in eo quod facere jubentur, sed in eo quod promiscuo jure aut solo permissu faciunt, id statim sibi acquirunt: capiunt enim non ut ministri. Talia sunt spolia quæ detrahuntur hosti in dimicatione singulari: talia etiam quæ procul ab exercitu (extra decem millia passuum dicebant Romani, ut mox videbimus) in liberis et injussis excursibus capiunt: quod

Salic. *in l.* 2. *C. de post. rer.* Th. Gram. *Decis. Neap.* 71. n. 18.

factam. At vero de Atheniensibus ita Scholiastes ARISTOPHANIS: Ἐπειδὴ οἱ Ἀθηναῖοι λαμβάνοντες πόλιν πολεμίαν, καὶ τοὺς ἐνεικοῦντας ἐκβάλλοντες, κλήρῳ τὴν γῆν αὐτοῖς διένεμον. In *Nubes*, vers. 103. Vide ibi Illustrissimi SPANHEMII Adnotat. *J. B.*

[6] Modo scilicet summus Imperans consentiat, aut expresse, aut tacite. *J. B.*

[7] Vide hac de re Amplissimum BYNCKERSHOEK, *Obs. Jur. Civ.* Lib. IV. cap. 14. *J. B.*

[p] *Nullo suo merito*] Sic et hæc duo opponit Servius ad *Æneidos* I. *Acti fatis. Laborat Virgilius nil Trojanorum meritis, sed omnia fatis asscribere.* (Ad vers. 32.)

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the things which are in our hands, that is, which are found with us when war arises. The same rule was observed with regard to men, at the time when men were reckoned among things captured. There is a noted passage of Typho on the subject: *Those who in peace come to another nation, if war between the nations suddenly breaks out, become the slaves of those enemies among whom their destiny has thrown them.* He speaks of *destiny* because they are reduced to slavery by no desert of their own. So Nævius, *It is the destiny of the Metelli to be consuls* at Rome.

2 It follows from the same view, that what soldiers capture, when not on duty or on service to which they are ordered, but in the course of what they do by promiscuous right or by permission, is forthwith their own: for they do this not as public servants. Such are spoils which they win from any enemy in single combat; and such as they take in free excursions not made by order, at a distance from the

genus prædæ Itali hodie *correriam* vocant, et a *butino* distinguunt.

XIII. Sed quod diximus jure gentium talia singulis directe acquiri, intelligendum est, ut id juris gentium sit ante omnem ea de re legem civilem: nam populus quisque inter suos aliter potest constituere, et dominium singulorum antevertere, sicut multis in locis de feris et avibus factum videmus. Sic enim introduci etiam lege potest, ut quæ apud nos reperiuntur hostium res, publicæ fiant.

XIV. 1 At de his quæ quis actu bellico capit alia est ratio. Ibi enim singuli reipublicæ personam sustinent, ejusque vice funguntur, ac proinde per eos populus, si lex civilis aliud non statuat, ut possessionem ita et dominium nanciscitur, et id in quos vult transfert. Quod quia directe pugnat cum vulgari opinione, probationes nobis video solito largius admetiendas ex nobilium populorum exemplis.

2 Incipiam a Græcis, quorum morem Homerus non uno loco describit [*Iliad.* Lib. I. vers. 125]:

> *Ἀλλὰ τὰ μὲν πολίων ἐξεπράθομεν, τὰ δέδασται.*
>
> Omnia jam divisa quibus spoliavimus urbes.

Apud eundem poëtam Achilles de urbibus agens quas ipse expugnaverat [Lib. IX. vers. 330, et seqq.]:

> *Τάων ἐκ πάσεων κειμήλια πολλὰ καὶ ἐσθλὰ*
> *Ἐξελόμην, καὶ πάντα φέρων Ἀγαμέμνονι δόσκον*
> *Ἀτρείδῃ· ὁ δ' ὄπισθε μένων παρὰ νηυσὶ θοῇσι*
> *Δεξάμενος διὰ παῦρα δασάσκετο, πολλὰ δ' ἔχεσκε.*

enemy; (the Roman rule was ten miles, as we shall see). This kind of capture the Italians at present call *correria, plunder,* and distinguish it from *butina, booty.*

XIII. But when we say that by the law of nations such things are acquired directly by individuals, we are to understand that this is the law of nations previously to all civil law. For any nation may establish a different rule with regard to its own subjects; and anticipate the ownership of individuals, as we see in many places done with regard to wild beasts and birds [by game-laws]. And so a rule may be introduced by law that all things which are taken from the enemy shall be public property.

XIV. 1 But with regard to the things which any one takes by a regular military process, the case is different. For then individuals bear the character of the State and act on its behalf; and therefore the people, if the civil law do not otherwise direct, obtains through

> Omnibus his ingens pretio numeroque supellex
> Nostra rapta manu: regi sed victor Atridæ
> Cuncta tuli, celeres residens qui pone carinas
> Divideret cum pauca aliis, sibi multa tenebat.

Spectandus enim hic Agamemnon, partim ut totius Græciæ eo tempore princeps, atque ita populi gerens vicem: quo jure ipse sed cum senatu prædam dividebat: partim ut munere fungens imperatorio, ac proinde de communi partem ceteris majorem ferens. Eum ipsum Agamemnonem sic alloquitur idem Achilles [Lib. I. vers. 163, 164]:

> *Οὐ μὲν σοί ποτε ἶσον ἔχω γέρας, ὁππότ' Ἀχαιοὶ*
> *Τρώων ἐκπέρσωσ' εὖ ναιόμενον πτολίεθρον.*

> Nam neque me tecum prædæ pars æqua sequetur,
> Si Danaum virtus Trojanam everterit urbem.

Et alibi Achilli offert Agamemnon de consilio publico navem plenam æris et auri, et viginti mulieres, quæ præcipiat de præda. Troja jam capta, Virgilio narrante, *Iliad.* ix. 279, *et seqq.* *Æn.* ii. 761, *et seqq.*

> Custodes lecti Phœnix et dirus Ulysses
> Prædam asservabant: huc undique Troïa gaza
> Incensis erepta adytis, mensæque Deorum,
> Crateresque auro solidi, captivaque vestis
> Congeritur.

Sic posterioribus temporibus prædam Marathoniam asservat Aristides. Post prælium ad Platæas severe edictum, ne quis de præda privatim quicquam tolleret: deinde præda pro populorum meritis distributa. Athenis postea devictis, in publicum Plut. *Arist.* p. 321 D. Herod. ix. 79.

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them both possession and ownership, and transfers it to whom it will. And as this is directly at variance with public opinion, we must adduce proofs more largely than usual, from the examples of the most eminent peoples.

2 I begin with the Greeks. Homer speaks of the cities being divided which had been taken: he makes Achilles say that he gave to Agamemnon all that he won in war. In which case Agamemnon is to be regarded partly as the prince of all Greece, and as representing the people; and partly as holding the office of general, and therefore having a larger share than the rest. So in another place Achilles says to him. [See.] And in another place, Agamemnon offers to Achilles, by the public consent, a ship full of brass and gold and twenty female slaves. So Virgil, speaking of the capture of Troy, describes the plunder under the custody of Phœnix and Ulysses. So at a later period, Aristides guarded the booty taken at Marathon. After the battle at Platæa there was a severe edict that no one should privately

Plut. *Lysan.* p. 442 A. Xenoph. *de Laced. rep.* c. 13. n. 11.

relata a Lysandro præda. Et publici officii nomen [q]apud Spartanos, λαφυροπῶλαι, *prædæ venditores.*

[[Æn. ix. 268.]]

3 Si ad Asiam venimus, Trojani soliti, ut docet nos Virgilius, *prædæ ducere sortem*, ut in rebus communibus dividendis fieri solet. Alias arbitrium ejus dividendæ penes Imperatorem, quo jure Hector Doloni id expresse stipulanti promittit equos Achillis, ut intelligas jus acquirendi dominii in captura sola non fuisse. Ad Cyrum Asiæ victorem, nec minus ad Alexandrum postea, perlata præda. Si Africam respicimus, idem mos occurrit. Sic quæ Agrigenti capta, quæque in pugna Cannensi, et alibi, Carthaginem missa. Apud Francos veteres, ut ex Gregorii Turonensis historia apparet, quæ capta erant [r]sorte dividebantur: neque rex ipse aliud habebat de præda quam quod sors ipsi addixisset.

Hom. *Iliad.* K. v. 321. Eurip. *Rhes.* v. 182, *et seqq.* Plin. xxxiii. 3. Plut. *Alex.* pp. 685, 686. Curt. iv. 1; viii. 4. Diod. xvii. 66, 71. Strabo, xv. pp. 729, 730. Diod. xiii. 90. Liv. xxiii. 12. Greg. Tur. ii. 27.

4 Sed quanto re militari Romani ceteris præstiterunt, tanto sunt digniores quorum exemplis immoremur. Dionysius Halicarnassensis, morum Romanorum diligentissimus observa-

Antiq. Rom. vii. 63.

q *Apud Spartanos*] Agesilao in Asia agente, castris Pharnabazi captis Spithridates subtraxerat prædam; inquisitione ab Erispida Lacedæmonio instituta aufugit. [Hoc refert Plutarchus, *Vit. Agesil.* pag. 601 E.]

r *Sorte dividebantur*] Habes hoc apud Turonensem Lib. II. cap. 27. Aymoinum Lib. I. cap. 12. et in epitome edita a Frehero cap. 9. Mos idem et aliarum gentium vetus. Servius ad illud *Æneidos* III. *Sortitus pertulit ullos: quia captivi et præda inter victores sorte dividebantur. Ut: et prædæ ducere sortem.* (In vers. 323.) De prædæ collatione in commune, et expurgatione per juramentum apud Suedos et Gothos, Johannem Magnum vide libro XI. c. 11. [Hac de re nihil ibi apud Johannem Magnum, neque puto alibi. *J. B.*]

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take any part of the booty. Afterwards, when Athens was conquered, the booty was made public property by Lysander: and the Spartan officers who had to deal with this measure were called *prize-sellers.*

3 If we go to Asia, the Trojans were accustomed, as Virgil teaches, *to draw prize-lots*, as is done in dividing common property. In other cases the decision of the matter was with the general: and by this right, Hector promises Dolon the horses of Achilles when he stipulates for them; by which you may see that the right of prize-treasure was not in the captor alone. So when Cyrus was victor, the booty was taken to him; and when Alexander, to him.

If we look at Africa the same custom recurs. Thus what was taken at Agrigentum, and in the battle of Cannæ, and elsewhere, was sent to Carthage.

Among the ancient Franks, as we learn from Gregory of Tours, what was captured was divided by lot; and the king had nothing of the booty but what the lot gave him.

tor, ita nos hac de re docet: *τὰ ἐκ τῶν πολεμίων λάφυρα, ὅσον ἂν ἡμῖν ὑπάρχῃ τυχεῖν δι' ἀρετὴν, δημόσια εἶναι κελεύει ὁ νόμος, καὶ τούτων οὐχ ὅπως τις ἰδιώτης γίνεται κύριος, ἀλλ' οὐδὲ αὐτὸς ὁ τῆς δυνάμεως ἡγεμών. ὁ δὲ ταμίας αὐτὰ παραλαβὼν ἀπεμπολεῖ, καὶ εἰς δημόσιον ἀναφέρει τὰ χρήματα· Quæcunque ex hostibus per virtutem capta sunt, ea lex jubet publica esse, ita ut non modo privati eorum domini non fiant, sed ne ipse quidem Imperator exercitus: verum quæstor illa accipit, et vendita in publicum refert.* Verba hæc sunt eorum qui Coriolanum incusant, [8]nonnihil ad invidiam composita.

XV. Nam [s]populum dominum esse prædæ verum erat: sed illud non minus verum, [t]ejus dispensandæ arbitrium Imperatoribus libera republica permissum fuisse, sed tale ut actus sui rationem populo deberent. L. Æmilius apud Livium: Lib. xxxvii. 32.
captas non deditas diripi urbes, et in his tamen arbitrium esse Imperatoris, non militum. Sed hoc arbitrium quod mos

[8] Vide Herm. Rhabod. Schelii Dissertationem *De Præda*, subjectam Hygino et Polybio, *De Castris Romanorum*, pag. 253, *et seqq.* qui tamen Auctorem nostrum nusquam laudat, quamquam de tota hac re accuratius, ante illum, dudum heic agentem. *J. B.*

[s] *Populum dominum esse prædæ verum erat*] Vide et hac de re Simlerum in Helveticis.

[t] *Ejus dispensandæ arbitrium Imperatoribus libera republica permissum fuisse*] Polybius in *Excerptis Peiresciânis* de L. Æmilio Paulo: *κύριον γενόμενον αὐτὸν πάσης βασιλείας καὶ λαβόντα τὴν ἐξουσίαν ὡς βούλεται χρήσεσθαι, μηδενὸς ἐπιθυμῆσαι· cum dominus factus esset regni integri possetque cuncta disponere suo arbitratu, nihil eum concupisse.* [Pag. 1454. *Edit. Amst.*]

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4 But in proportion as the Romans were eminent above other nations in military matters, they are the most worthy examples to refer to. Dionysius of Halicarnassus, a most diligent observer of Roman manners, thus teaches us on this subject: *Whatever is captured from the enemy, the law directs to be public property; so that not only private persons are not the owners of it, but even the general is not. The Questor takes it, sells it, and carries the money to the public account.* These are the words of those who accuse Coriolanus, somewhat turned to the purpose of making him odious.

XV. For, that the people was the owner of the prize-treasure was true; but it was not less true that the office of deciding on its distribution had been left with the General while the republic was free; with the condition that he was responsible to the people. So L. Emilius, *Cities taken not surrendered, are plundered; but in these cases the decision is with the general, not the soldiers.* But this decision which usage gave to the general, they sometimes, in order to

deferebat imperatoribus, ipsi interdum, quo longius ab omni
Liv. v. 22. suspicione essent, rejiciebant ad Senatum, ut Camillus; et qui
retinebant, prout religioni, famæ, ambitioni serviebant, diverso
modo usi reperiuntur.

XVI. 1 Qui sanctissimi esse aut credi volebant, [u]prædam non attingebant omnino, sed sive pecunia erat in præda, eam jubebant a quæstore populi Romani percipi; sive res aliæ, eas per quæstorem sub hasta venumdari: unde redactam pecuniam manubiarum nomine significatam Favorinus apud
Lib. xiii. 24. Gellium sensit. Hæc pecunia per quæstorem in ærarium deferebatur, prius tamen, si res triumphi esset, ostentata publice.
Cap. 53. Livius libro IV. de C. Valerio consule: *prædæ ex assiduis populationibus, quod omnia in locum tutum congesta erant, fuit aliquantum: venditum sub hasta consul in ærarium redigere quæstores jussit.* Idem fecit Pompeius de quo hæc
Lib. ii. 37. sunt Velleii verba: *pecunia Tigranis, [x]sicut Pompeio moris erat, redacta in quæstoris potestatem ac publicis descripta*
Lib. ii. ep. 17. *literis.* Ita et M. Tullius qui sic de se ipso in literis ad Sallustium: *de præda mea præter quæstores urbanos, id est, populum Romanum, teruntium nec attigit, nec tacturus est*

[u] *Prædam non attingebant omnino*] *Manius Curius juravit se ex præda nihil attigisse, præter guttum faginum quo sacrificaret.* [Hoc e Plin. *Hist. Nat.* Lib. XVI. cap. 38. *J. B.*] Scriptor vitæ Virorum illustrium [Aurelius Victor, cap. 60.] de Mummio agens: *Corinthum signis tabulisque spoliavit, quibus cum totam replesset Italiam, in domum suam nil contulit.* De nominato modo Æmilio Paulo Plutarchus: *οὐδενὸς δ' ἧττον αὐτοῦ τὴν ἐλευθεριότητα καὶ τὴν μεγαλοψυχίαν ἐπήνουν οἱ ἄνθρωποι, πολὺ μὲν ἀργύριον, πολὺ δὲ χρυσίον*

avoid all suspicion, threw upon the Senate, as Camillus: and they who retained it, in proportion as they were actuated by conscience, reputation, or ambition, are found to have used it diversely.

XVI. 1 They who wished to be, or to appear, most scrupulous, did not at all touch the booty, but if the prize were money, directed it to be received by the questor; or, if it were other objects, ordered them to be sold by auction (*sub hastâ*) by the questor: and on this account the money thus raised was called *manubiæ.* This money was transferred by the questor into the treasury: being in the first place however, if there was a triumph, publicly shewn. So Livy of C. Valerius; Velleius of Pompey; Cicero of himself. And this was the common custom in the good old times. So Plautus.

2 But other generals sold the booty themselves without the intervention of the questor, and transferred it to the treasury, as is to be collected from the words of Dionysius. So when king Tarquin had

quisquam. Atque id antiquis et melioribus temporibus fuit maxime usitatum, quo Plautus respiciens sic ait: *Bacch.* 9. iv. 152.

Nunc hanc prædam omnem jam ad quæstorem deferam.

Et de hominibus captivis similiter: *Capt.* i. 2. 2.

Quos emi de præda de quæstoribus.

2 Sed alii sine quæstore ipsi prædam vendebant et referebant in ærarium, quod et ex Halicarnassensi sequentibus verbis colligere est. Sic a Tarquinio rege jam olim victis Sabinis prædam et captivos Romam missos legimus. Sic Romilius et Veturius consules narrantur prædam vendidisse ob ærarii penuriam, ægre id ferente exercitu. Sed cum passim id occurrat, quantum ducum quisque ex triumphis Italicis, Africanis, Asiaticis, Gallicis, Hispanicis in ærarium per se aut quæstorem retulerit, exempla congerere nihil est opus. Illud magis notandum, datam prædam aut ejus partem interdum Diis, interdum militibus, interdum et aliis. Diis aut res ipsæ datæ, ut spolia quæ Romulus Jovi Feretrio suspendit, aut redacta inde pecunia, ut ex Pometinis manubiis Tarquinius Superbus templum Jovis in monte Tarpeio statuit. Liv. i. 37. Liv. iii. 31. Dion. Halic. ii. 34. Liv. i. 10. Liv. i. 53. et 55.

XVII. 1 Militibus prædam dare priscis Romanis ambitiosum videbatur: uti Sextus Tarquinii Superbi filius, sed Gabiis Liv. ibid. c. 54.

ἐκ τῶν βασιλικῶν ἠθροισμένον οὐδ' ἰδεῖν ἐθελήσαντος, ἀλλὰ τοῖς ταμίαις εἰς τὸ δημόσιον παραδόντος· *nec minus liberalitatem ipsius et animi magnitudinem prædicabant homines, quod congestam ex regis opibus auri argentique vim magnam nec inspicere voluisset, sed quæstoribus in publicum deferendam dedisset.* (Pag. 270 D.)

[x] *Sicut Pompeio moris erat*] Ut plurimum: vide quod sequente paragrapho ex Lucano adducetur.

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conquered the Sabines, he sent the booty and the captives to Rome. So Romilius and Veturius the consuls are related to have sold the booty on account of the low state of the treasury, the army being much discontented with the proceeding. But inasmuch as this occurs perpetually, there is no need to accumulate examples, how much each general carried to the treasury from Italian, African, Asiatic, Gallic and Hispanic triumphs. That is rather to be noted, that the booty, or a part thereof, was sometimes given to the gods, sometimes to the soldiers, and sometimes to others. To the gods either the captured things themselves were given, as the spoils which Romulus hung up to Jupiter Feretrius, or the money produced from them, as Tarquinius Superbus from the Pometine spoil built the temple of Jupiter in the Tarpeian mount.

XVII. 1 To give the plunder to the soldiers appeared to the ancient Romans an act savouring of ambition or popularity-hunting:

profugus, prædam militi dilargitus dicitur, ut eo modo potentiam sibi conciliaret. Appius Claudius in senatu similem largitionem arguit ut novam, prodigam, inconsultam.

Liv. v. 20.

Præda autem militi concessa aut dividitur, aut diripitur. Dividi potest aut ratione stipendiorum, aut [y] ratione meritorum. Stipendiorum ratione dividi prædam Appius Claudius volebat, si illud obtinere non posset, ut redacta inde pecunia in ærarium deferretur. Totum autem dividendi ordinem accurate explicat Polybius: nempe in dies aut [9] vigilias partem exercitus alteram, aut minorem ad comportandam prædam mitti solitam: et quod quisque reperisset id jussum in castra perferre ut per tribunos æqualiter divideretur, vocatis ad partem etiam his qui castra servarent, (quod et apud Hebræos regi Davidi placuisse, et inde in legem transiisse legimus) quique per valetudinem aut delegata ministeria aberant.

D. loco.

Lib. x. 16.

1 *Sam.* xxx. 24.

[y] *Ratione meritorum*] Id apud Hebræos factum docet Josephus Lib. III. *Antiquæ Historiæ* (cap. 2. § 5. *Ed. Hudson.*)

[9] De Vigiliis nihil apud Polybium: immo ipse, paullo ante locum indicatum, narrat, Scipionem, expugnata nova Carthagine in Hispania, quum nox adventaret, jussisse milites finem diripiendi facere, et præsidium collocari in Foro ad adservandam prædam. *J. B.*

[z] *Tribuno et equiti*] Tribuno et præfecto equitum ait Appianus *Civilium* II. [Pag. 491. *Ed. H. Steph.* Atque hæc est vera distributio: aliam, ex errore memoriæ, in ipso contextu Auctor posuerat. In loco autem Suetonii, ad quem simul ora libri nos remittit, non dicitur quantum daretur Equitibus, nisi ex vitio priscarum Editionum, secundum quas distributio facta fuisset modo plane diverso ab iis omnibus, quos Auctor noster commemorat. *J. B.*]

[1] Non hoc narrat Livius, quem Auctor in ora libri indicat: sed Dionysius Halicarnass. *Antiq. Rom.* Lib. VI. cap. 94. *J. B.*

[a] *Ex præda Coriolana*] Vide Plutarchum *Coriolano.* (Pag. 218 A, B.)

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as Sextus the son of Tarquin the Proud, while an exile at Gabii, is said to have distributed the booty among the soldiers, as a mode of gaining influence. Appius Claudius in the senate condemned a similar liberality as new, lavish, and imprudent.

Booty which is given up to the soldiers is either divided or scrambled for. It may be divided either in the proportion of the pay, or of the deserts of individuals. That it should be divided in proportion to the pay, was the direction of Appius Claudius; and if he could not carry that, that the money raised from it should be transferred to the treasury. Polybius explains accurately the whole scheme of such a division; namely, that one part of the army, the lesser portion, was commonly sent to collect the booty; and that what each found he was ordered to bring into the camp, that it might be equally divided by the tribunes; those being summoned to take their share who had guarded the camp, (which also was ordered by David among the

2 Interdum non ipsa præda sed redacta inde pecunia Liv. xlv. 34, 40, 43.
prædæ loco militibus donata, quod sæpe in triumpho fiebat.
Proportionem hanc invenio, simplex pediti, duplex centurioni, *Ibid.* 40.
triplex equiti datum. Interdum simplex pediti, equiti duplex. Liv. xlv. 34.
Alias simplex pediti, duplex centurioni, [z]tribuno et equiti Suet. *Cæs.* c. 38. *et* App.
quadruplex. Meritorum etiam sæpe habita ratio, sicut Mar- ii. *Civil.*
cius quod [1]fortiter fecisset [a]ex præda Coriolana donatus est a Liv. *ibid.*
Posthumio.

3 Utrovis modo fieret divisio [b]licebat Imperatori *ἐξαίρετον*, hoc est, præcipium sibi accipere quantum vellet, id est, quantum æquum arbitraretur: [c]quod et aliis interdum virtutis ergo concessum. Euripides *Troadibus* de nobilioribus feminis Trojanis agens, ait (vers. 33):

Τοῖς πρώτοισιν ἐξῃρημέναι
στρατοῦ.

[b] *Licebat Imperatori*] Vide Leunclavium in *Turcicis.*

[c] *Quod et aliis interdum virtutis ergo concessum*] Sic Nestor feminam possidebat:

ἣν οἱ Ἀχαιοὶ
Ἔξελον.
munere Graium
Exceptam sorti.

Est id *Iliados* Λ. (vers. 625.) At *Odysseæ* Ξ. Ulysses ait (vers. 232):

Τῶν ἐξαιρεύμην Μενεοικέα, πολλὰ δ' ὀπίσσω
Λάγχανον.
Eximiam accepi Meneœcea, plurima deinde
Sorte tuli.

Euripides *de Cassandra :*

Ἐξαίρετόν νιν ἔλαβεν Ἀγαμέμνων ἄναξ.
Sibi hanc Atrides major eximiam tulit.
[*Troad.* vers. 249.]

De iis quæ Atheniensium duci Demostheni e præda *ἐξῃρέθησαν*, præcipui jure data sunt, vide Thucydidem, libro III. [c. 114. In loco *Iliadis*, XIV. 232. Auctor noster, nescio quare, legit *Μενεοικέα*, (quod nomen proprium mulieri non convenit) pro adjectivo, apud Poetam, frequentissimo, et heic aptissimo, *μενοεικέα*. Omnino dicere vult Ulysses, se pretiosissima quæque, et quæ maxime ipsi placerent, elegisse. *J. B.*]

Hebrews, and thence, as we learn, passed into a law,) and those who had been absent from sickness, or any sent off on service elsewhere.

2 But it was not the booty itself, but the money raised from it, which was given to the soldiers in the place of the booty, which was often done in the triumph. I find this proportion in Livy; one share to a foot-soldier, twice as much to a centurion, three times as much to a horseman or knight. Sometimes one share to each of the foot, two to the horse. Again, one share to the foot-soldier, two to the centurion, four to the tribune and the horsemen. Often account was taken of desert, as Marcius, in consideration of his bravery, was rewarded out of the spoils of Corioli by Posthumius.

3 In whatever way the division was made, it was allowed to the general to take a *first choice*, some principal thing, of what value he chose, that is, what he thought fair: and this was some-

Quæ principibus eximiæ datæ
Erant Achivis:

Et de Andromacha (*ibid.* vers. 274):

Καὶ τήνδ' Ἀχιλλέως ἔλαχε παῖς ἐξαίρετον.
Accepit illam Pyrrhus eximiam sibi.

Ascanius de equo apud Virgilium (*Æn.* IX. 270, 271):

Ipsum illum clypeum, cristasque rubentes
Excipiam sorti.

Pausaniæ post in Platæis prælium eximia data, mulieres, equos, camelos, narrat Herodotus. (Lib. ix. 80.) Sic Ocrisiam Corniculanam præcipuam accepit rex Tullius. (Dion. Halic. iv. 1.) [d]Fabricius apud Halicarnassensem in oratione ad Pyrrhum: (*Excerpt.* pp. 714, 715.) ἐκείνων δορυκτήτων ἐξόν μοι λαβεῖν ὁπόσα βουλοίμην· *ex his quæ bello erant capta licebat mihi quantum vellem excipere.* Isidorus huc respiciens ubi de jure agit militari: (Orig. v. 7.) *prædæ*, ait, *decisio, et pro personarum qualitatibus ac laboribus justa divisio, ac principis portio.* Tarquinius Superbus, ut apud Livium est, (Lib. i. 57.) et ipse ditari volebat, et delinire præda popularium animos. Servilius in oratione pro L. Paulo ait eum præda partienda (Liv. xlv. 37.)

[d] *Fabricius*] Cujus exemplum et sibi et militi proponit Julianus apud *Ammianum* libro XXIV. (cap. 3.) [[Supra pro *Tullio* lege *Tarquinius Priscus*, monente Gronovio.]]

[2] Non *se* ipsum, sed Servium Gal-

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times awarded to others on account of their valour. So Euripides in the *Troades*, speaking of the noblest of the Trojan women, says, that they were given to the leaders of the army. And of Andromache, that in this way she became the property of Pyrrhus. So Ascanius says, in Virgil, that the shield and the helmet he will exclude from the division by lot. Herodotus tells us that after the battle at Platæa, Pausanias had, given to him, the most eminent objects, women, horses and camels. So king Tullius received Ocrisia, the principal person of the Corniculanæ. Fabricius in Dionysius, in his oration to Pyrrhus, says, *Of those things which were taken in war, it was allowed me to take what I chose.* Isidorus, referring to this passage, when he speaks of military law, says, *the distribution of the spoil is, a just division according to the qualities and performances of persons, and the prince's portion.* Tarquin the Proud, as it stands in Livy, both wished to enrich himself and to win the minds of the people with the distribution of prize-money. Servilius in his oration for L. Paulus, says that he might have made himself rich by dividing the shares of booty*. And there are writers who think that the prince's

* Not *himself*, but Servius Galba, who was discontented that he was not allowed to make the division. *J. B.*

locupletem se [2]facere potuisse. Et hanc Imperatoris portionem sunt qui potius significatam volunt manubiarum nomine, quos inter est Asconius Pedianus. *In Verr.* i. 59.

4 Sed laudatiores illi, qui jus suum remittentes nihil sibi de præda ceperunt, qualis is quem dixi Fabricius, τὸν ἐκ δικαίου πλοῦτον ὑπεριδὼν ἕνεκα δόξης, *etiam juste partas divitias præ gloria contemnens:* quod ipse se facere aiebat Valerii Publicolæ et aliorum paucorum exemplo: quos M. Porcius Cato imitatus est in Hispaniensi victoria, negans quicquam ad se perventurum e bello captis, præter ea quæ in cibo ac potu insumsisset: addens tamen, non a se culpari Imperatores qui concessas utilitates sumerent, sed malle se de virtute cum optimis, quam de pecunia cum ditissimis certare. Proxime ad hanc laudem accedunt qui prædam modice delibarunt, ut Pompeius apud Lucanum a Catone laudatur, qui *Apud Dion. Halic. Excerpt.* p. 714. Plut. *Marc. Caton.* p. 342. *Pharsal.* ix. 197.

Plura retentis
Intulit.

5 In divisione interdum et absentium habita ratio, ut capto Anxure constituit Fabius Ambustus; interdum ob causam Liv. iv. 59.

bam, qui ægre ferebat, quod militibus suis præda data non fuisset, in qua partienda ipse locuples fieri poterat. *J. B.*

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portion was rather what was really meant by *manubiæ*, as Asconius Pedianus.

4 But those persons are more praised who, giving up their right, took no part of the booty to themselves; like Fabricius, of whom I have spoken, *Who in his love of glory put aside even just gain*, as Dionysius says; which he said he did according to the example of Valerius Publicola, and a few others. And these, M. Porcius Cato also imitated in his Spanish victory; asserting that nothing should come to him from the spoils of war, except what he had spent in meat and drink: adding however, that he did not blame the generals who had accepted the advantages usually granted; but that he would rather contend for the prize of virtue with the best, than for the pre-eminence in wealth with the richest. Nearest to this praise come those who have taken to themselves a moderate share of the prize-treasure; as Pompey in Lucan is praised by Cato, for having given up more than he kept.

5 In the division, there is sometimes account taken of those who have been absent; as Fabius Ambustus directed when Anxur was taken. And sometimes for some special reason account is not taken of some of those who were present, as of the Minutian army, by the dictator Cincinnatus.

quorundam quamvis præsentium non habita, ut Minutiani exercitus dictatore Cincinnato.

Liv. iii. 29.

6 Quod autem jus vetere republica Imperatores habuerant, id post occupatam rempublicam ad magistros militum translatum ex Codice Justinianeo apparet, ubi a gestorum insinuatione absolvuntur donationes rerum mobilium vel se moventium, quas magistri militum militibus præstant ex spoliis hostium, sive in ipsa bellorum occupatione, sive in quibuscumque locis degere noscerentur.

L. 36. § 1. C. de donat.

7 Sed hæc divisio jam olim sæpe in calumniam patuit, quasi duces ea ratione privatam gratiam captarent, quo nomine accusati Servilius, Coriolanus, Camillus, quasi amicis et clientibus de publico largientes. Ipsi contra se tuebantur publico bono, ἵνα οἱ συναράμενοι τοῦ ἔργου, τὸν τῶν πόνων καρπὸν κομισάμενοι, προθύμως ἐπὶ τὰς ἄλλας στρατιὰς ἀπαντῶσιν· *ut qui operi adfuerant, fructu laboris percepto, ad alias expeditiones fierent promtiores;* quæ Halicarnassensis in hanc rem verba sunt.

Dion. vi. 30. Idem vii. 63. Liv. v. 32.

Dion. Halic. vii. 64.

[e] *Epiri urbes*] Et Athenas Sulla. Appianus Mithridatico (pag. 195.)

[f] *Lucullus*] Ab eo data diripienda militi Tigranocerta, narrat Plutarchus, (pag. 511 E.) ex spoliis datas singulis præterea drachmas octingentas. Severus Ctesiphontis prædam concessit militi: idem et tribunos et duces et ipsos milites habere jussit quæ per vicos diripuerant. Ælius Spartianus narrat. Mahumetes II. Constantinopoleos et prædam et mancipia promisit militi. [Quod primum narrat Spartianus, factum equidem est a Septimio Severo Imp. at

6 The right which, under the old republic, the Imperator had, was after the extinction of the republic, transferred to the *magistri militum*, as appears by the Codex of Justinian; where, in speaking of reports to be made to the emperor, of the proceedings of the military authorities, an exception is made with regard to donations of moveables which the *magistri militum* make to the soldiers out of the spoils of the enemy; whether in the occupation of war, or in the places where they are known to live.

7 But this division, from an early period, gave opening to calumny, as if the generals had in this way sought private favour; on which ground accusations were brought against Servilius, Coriolanus, Camillus, as having lavished the public treasure upon their friends and clients. And they defended themselves by alleging the public good, *that they who had had a share in the service, by receiving the reward of their labour, might be more prompt to other expeditions,* as Dionysius says.

XVIII. 1 I come now to speak of indiscriminate pillage. This was granted to the soldiers, either when a country was to be ravaged; or,

XVIII. 1 Venio ad direptionem: ea militi concessa aut in populatione, aut post prælium oppidive expugnationem ut signo dato discurreretur: quod antiquis sæculis rarius, nec tamen exemplis caruit. Nam Suessam Tarquinius militi diripiendam dedit: castra Æquorum Q. Servilius Dictator: Veios urbem Camillus: castra Volscorum consul Servilius. Permisit et direptionem L. Valerius in agro Æquorum, Q. Fabius fusis Volscis, captaque Ecetra, mox alii sæpe. Victo Perseo Paulus consul spolia jacentis exercitus peditibus, equitibus prædam circumjacentis agri concessit. Idem ex senatusconsulto diripiendas dedit militi [e]Epiri urbes. [f]Lucullus victo Tigrane, militem a spoliis legendis diu inhibuit, mox certa jam victoria jus spoliandi hostes indulsit. Cicero de inventione primo inter modos acquirendi dominii ponit, si quid ex hostibus captum sit, [g]cujus prædæ sectio non venierit.

Dionys. iv. 50. Liv. iv. 47. Liv. v. 20. Dion. Halic. vi. 29. Idem ix. 55. Idem x. 21. Liv. xliv. 45. Idem xlv. 34. App. *Mithrid.* p. 230. Cap. 45.

2 Qui morem hunc improbant, aiunt avidas in direptiones manus præripere fortium bellatorum præmia, cum ita ferme

posterius est Alexandri Severi. Prius exstat in *Vit. Sever.* cap. 16. alterum in *Vit. Alex. Sever.* cap. 55. Adeoque nominum similitudo Auctori nostro caussa fuit erroris. *J. B.*]

[g] *Cujus prædæ sectio non venierit*] Varro sex modos numerat, quibus dominus legitimus perficiatur, hereditatis justæ aditionem, mancipationem, in jure cessionem, usucapionem, e præda sub corona venditionem, et ab auctione publica, cum bona cujusquam sectione veneunt. [*De Re Rust.* Lib. II. cap. 10. Quo de loco vide WILHELMI GOESII *Vindic. pro recepta de Mutui alienatione sententia*, p. 66, *et seqq.* *J. B.*]

after a battle or the taking of a town, it was allowed that pillage was to begin at an appointed signal. This was rare in early ages, but still, not without example. Tarquinius gave up Suessa to be pillaged by the soldiers; Q. Servilius the Dictator gave up the camp of the Equi to the same fate: Camillus the city of Veii; Servilius the consul, the camp of the Volsci; L. Valerius permitted pillage in the country of the Equi; Q. Fabius did so when the Volsci had been dispersed, and Ecetra taken; and others frequently on subsequent occasions. When Perseus was conquered, Paulus the consul gave the spoils of the army which was defeated to the infantry, the plunder of the surrounding country to the cavalry. The same leader, by a decree of the senate, gave up the cities of Epirus to pillage by the soldiers. When Lucullus conquered Tigranes, he long restrained the soldiers from taking spoil, but at last, when the victory was certain, he gave permission to pillage. Cicero puts, among the ways of acquiring property, if we take anything from the enemy which is not liable to be divided and sold on the public account.

2 They who condemn this practice say, that greedy hands, active

eveniat, [h]ut qui segnior sit prædetur, at fortissimus quisque laboris periculique præcipuam partem petere soleat, quæ sunt Lib. v. 20. verba Appii apud Livium: unde non longe abit Cyri illud De Cyri Inst. vii. 2. n. 4. apud Xenophontem: ἐν τῇ ἁρπαγῇ εὖ οἶδ' ὅτι οἱ πονηροὶ Apud Liv. *ubi supr.* πλεονεκτήσειαν ἄν. Sed contra dicitur, gratius id fore lætiusque quod sua quisque manu ex hoste captum domum retulisset, quam si multiplex accepisset alterius arbitrio.

3 Interdum quoque concessa direptio, quod impediri non posset. In expugnatione Cortuosæ Hetruscorum oppidi, nar-Lib. vi. 4. rante Livio, *publicari prædam tribunis placebat, sed imperium quam consilium segnius fuit: jam militum præda* Liv. xxxviii. 43. *erat, nec nisi per invidiam adimi poterat.* Sic et Gallogræcorum castra a C. Helvii agmine direpta legimus contra ducis voluntatem.

XIX. Quod dixi, aliis interdum extra milites prædam aut pecuniam e præda redactam concedi solere, id ferme ita contigit, ut his qui tributum ad bellum contulerant tantundem Dion. Hal. v. 47. redderetur. Ludos quoque ex manubiis interdum instructos notes.

[h] *Ut qui segnior sit prædetur*] Vide quæ jam nunc ex Procopio adferemus ad § 24.

[i] *Apollini*] Meminit et Appianus in *Excerptis Peirescianis.* (pag. 546.)

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in pillage, are so forward as to snatch the prizes which ought to fall to the share of the bravest; for it commonly happens that they who are slowest in fight are quickest in plunder, while the bravest soldiers commonly take the main share of danger and toil; as Appius says in Livy. And so in Xenophon. On the other hand it is said that what each takes from the enemy with his own hand and carries home, is more grateful and valued than a thing of many times the value, which he receives at the will of another.

3 Sometimes again, pillage is allowed, when it cannot be prevented. In the storming of Cortuosa, a town of the Hetrusci, Livy says, *The Tribunes directed that the booty should be public property; but the command was too slow for the intention. The soldiers had already taken the booty, and it could not be taken from them without doing a very odious thing.* So the camp of the Gallo-Græcians was plundered by the troops of C. Helvius contrary to the general's wish.

XIX. What I have said, that booty or prize-money is sometimes given to others than soldiers, generally happens, in order that those who have contributed to the expenses of the war should be remunerated; we may also sometimes read of public spectacles provided out of the spoils.

XX. 1 Neque vero diversis tantum bellis aliter atque aliter usurpatum, sed eodem bello eadem præda sæpe in usus diversos impensa, aut partibus divisis, aut rerum generibus distinctis. Sic Camillus decimam ex præda [i]Apollini Pythio Liv. v. 23. dedit, Græcorum exemplo, sed quod primitus ab Hebræis venerat: quo tempore sub decima prædæ vota, non res moventes tantum, sed et urbem, et agros venire a pontificibus judicatum est. Eodem victore prædæ de Faliscis pars maxima *Ibid.* c. 19. ad quæstorem redacta est, haud ita multum militi datum. Sic et L. Manlius *prædam aut vendidit, quod ejus in publicum redigendum erat, aut cum cura ut quam æquissima esset per milites divisit:* quæ Livii verba sunt. Lib. xxxviii. 23.

2 Genera in quæ præda dividi potest sunt hæc: homines captivi, armenta, et greges, quæ Græci, cum proprie loquuntur λείαν vocant, pecunia, res mobiles aliæ, pretiosæ aut viliores. Q. Fabius Volscis devictis λείαν et spolia per quæstorem vendi Dion. *Ant.* viii. 82. jubet: argentum ipse defert. Idem Volscis et Æquis devictis Idem x. 21. captivos extra Tusculanos militi donat, et in agro Ecetrano homines ac pecora diripienda concedit. L. Cornelius Antio *Ibid.* capto aurum, argentum, æs in ærarium defert: captivos et

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XX. 1 But not only have different usages prevailed in different wars, but in the same war the same booty has often been applied to different uses, either by dividing it into parts, or by distinguishing the kind of objects. Thus Camillus dedicated the tenth part of the spoil to Pythian Apollo, following the example of the Greeks, which however, came originally from the Hebrews: and at that time, the dedication of a tenth of the spoil was held by the priests to include, not moveables only, but the lands and the city. By the same general, when victorious over the Falisci, the greater part of the booty was transferred to the questor, and a small part only given to the soldiers. So L. Manlius, *either sold the spoil, that part of it which was to go to the public, or divided it among the soldiers, taking care that the division should be exactly fair,* as Livy says.

2 The classes of objects into which spoil may be divided, are these: men, captives, herds and flocks, which the Greeks, when they speak strictly, call λεία; money and other moveables, either precious or common. Q. Fabius, when he had conquered the Volsci, ordered the λεία and spoils to be sold by the questor; he himself managed the money. The same, when the Volsci and Æqui were conquered, gave to the soldiers the captives, except the Tusculans; and in the land of Ecetra, gave up men and cattle to pillage. L. Cornelius, when Antium was taken, transferred to the treasury the gold, silver,

prædam per quæstorem vendit: militi ea permittit, quæ ad Idem x. 25. victum et vestem pertinebant. Nec dissimile huic Cincinnati institutum, qui Corbione Æquorum oppido accepto pretiosiora prædæ Romam misit, cetera centuriatim divisit. Camillus Liv. v. 22. captis Veiis, præter pecuniam ex venditione captivorum, Idem vi. 4. nihil in publicum redegit; Hetruscis devictis captivisque venditis, ex ea pecunia aurum matronis quod contulerant persolvit, Idem vi. 13. pateras tres aureas in Capitolio posuit. Cosso dictatore, ex Volscis præda omnis præter libera corpora militi concessa est.

Dion. Hal. *Excerpt.* p. 714. 3 Fabricius superatis Lucanis, Brutiis, Samnitibus, militem ditavit, tributa civibus reddidit, quadringenta talenta [k] in Liv. xxv. 14. ærarium retulit. Q. Fulvius et Appius Claudius, cum Hannonis capta essent castra, prædam vendiderunt, diviseruntque, App. *Pun. Bell.* p. 83. donatis quorum opera fuerat singularis. Scipio, capta Carthagine, quæ in urbe erant dedit diripienda militi, excepto Liv. xxxvii. 5. auro, argento, donariis. Acilius, capta Lamia, partim divisit, partim vendidit prædam. Cn. Manlius victis Gallogræcis, Liv. xxxviii. 23. concrematis ex Romana superstitione hostium armis, ceteram

[k] *In ærarium retulit*] Et Fabius pecuniam venditorum hominum capto Tarento, cum prædæ reliquum militibus dispertisset. [Aliter rem narrant Livius, Lib. xxvii. c. 16. num. 7. et Plutarchus, *Vit. Fab.* pag. 187 c.

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and brass; the captives and spoil he sold by the questor; he gave up to the soldiers what pertained to food and raiment. Nor was the rule of Cincinnatus dissimilar, who, when he became master of Corbio, a town of the Æqui, sent the more precious parts of the spoil to Rome, and divided the rest according to centuries. Camillus, when Veii was taken, assigned nothing to the public except the money from the sale of the captives. When the Hetrusci were conquered, and the captives sold, out of the money he repaid to the matrons the gold which they had contributed, and placed three golden pateræ in the Capitol. When Cossus was dictator, all the prey of the Volsci, except the bodies of the free men, was given up to the soldiers.

3 When Fabricius had conquered the Lucani, Brutii and Samnites, he enriched the soldiers, restored the tributes to the cities, and carried forty talents to the treasury. Q. Fulvius and Appius Claudius, when the camp of Hannibal was taken, sold the booty and divided it, giving donations to those who had performed eminent services. Scipio, when Carthage was taken, gave up to pillage what was in the city, excepting the gold, silver and donations. Acilius, when Lamia was taken, partly divided and partly sold the spoil. Cn. Manlius when the Gallo-Græcians were conquered, burnt their arms

prædam conferre omnes jussit, et aut vendidit, quod ejus in publicum redigendum erat, aut cum cura, ut quam æquissima esset, in milites divisit.

XXI. 1 Ex his quæ diximus apparet, non minus apud Romanos, quam apud alias gentes plerasque prædam fuisse populi Romani, sed ejus dispensandæ arbitrium aliquod Imperatoribus concessum, ita tamen ut, quod ante diximus, rationem actus sui populo deberent: quod inter alia docet exemplum L. Scipionis qui damnatus est peculatus judicio, ut loquitur Valerius Maximus, quadringenta octoginta argenti plus accepisse quam in ærarium retulisset: et aliorum quos ante retulimus. Lib. v. 3. et Liv. xxxviii. 55.

2 M. Cato in oratione quam de præda scripsit, vehementibus atque illustribus verbis, ut ait Gellius, de impunitate peculatus atque licentia conquestus est: ex qua oratione hoc exstat fragmentum: *Fures privatorum furtorum in nervo atque compedibus ætatem agunt. Fures publici in auro atque purpura.* Idem alibi dixerat, *mirari se, audere quem-* Lib. xi. 18. Prisc. Lib. vii. in fin. p. 782.

Confudit forte Auctor noster, quod Historicus Latinus paullo infra refert de Scipione, ubi Hasdrubalem devicisset, cap. 19. n. 2. *J. B.*]

from a Roman superstition, and ordered all to bring in the rest of the spoil; and either sold that part of it which was to go to the public, or divided it with care that the division should be fair*.

XXI. 1 From what we have said, it appears that among the Romans, as well as among most other nations, the spoil belonged to the people, but that some discretion in dividing it was allowed the general; but, as we have said, in such way that he was responsible to the people. This appears, among other instances, by the example of L. Scipio, who was condemned for peculation, as Valerius Maximus tells us, as having received four hundred and eighty sesterces of silver more than he had transferred to the treasury; and of others whom we have mentioned.

2 M. Cato, in an oration concerning prize-treasure, written, as Gellius says, in vehement and brilliant language, complained of the impunity and licence of peculation. Of that oration this fragment is extant: *Private robbers are put in prison and in bonds: public robbers are seen in purple and gold.* He had elsewhere said that *He marvelled that any one could set up in his house images which were taken in war.* So Cicero makes it a point to inflame the odium against

* He had quoted this before, Art. 1, of this section, but had by mistake called the general L. Manlius instead of Cnæus Manlius. (Gronov.)

quam capta bello signa pro supellectile domi statuere. Ita Verr. iv. 41. et Verri peculatus invidiam auget Cicero, quod signum sustulisset, et quidem captum de præda hostium.

3 Nec Imperatores tantum, sed et milites peculatus prædæ nomine tenebantur, si nempe eam in publicum non detulissent: Hist. x. 16. adigebantur enim omnes sacramento, ut ait Polybius, *περὶ τοῦ μηδένα νοσφίζεσθαι μηδὲν τῶν ἐκ τῆς διαρπαγῆς, ἀλλὰ τηρεῖν τὴν πίστιν κατὰ τὸν ὅρκον· nihil quemquam ex præda interversurum, sed fidem servaturos ex religione sacramenti.* Lib. xvi. 4. Quo forte referri potest formula jurisjurandi apud Gellium, [3]qua militi imperatur ne quid tollat in exercitu decemque millia passuum prope, quod pluris sit nummi argentei, aut si sustulerit ad consulem proferat, aut triduo proximo profiteatur. L. pen. ad l. Jul. pecul. Hinc intelligi potest quid sit quod Modestinus dicit: *is qui prædam ab hostibus captam surripuit peculatus tenetur:* quod vel unum satis esse debuit ut juris interpretes moneret ne ex hostibus capta singulis acquiri crederent, cum constet L. 1. cod. tit. peculatum non esse nisi in re publica, sacra, aut religiosa. Hæc omnia eo pertinent, ut appareat, quod supra diximus,

[3] Vide hac de re Rhab. Herm. Schelii Dissertationem *De Sacramentis Militum*, pag. 184, *et seqq.* in libro jam supra laudato. *J. B.*

Verres, that he had appropriated an image, and that one taken as spoil from the enemy.

3 And not the generals only, but the soldiers also, were held accountable for peculation of prize-treasure; that is, if they did not transfer it to the public. For all were bound by the military oath, as Polybius says, not to appropriate any part of their booty, but to keep their good faith as sworn. And to this perhaps we may refer the formula of oath in Gellius, by which the soldier is commanded not to take anything, within ten miles of the army, of more value than a silver *nummus* (sesterce), or if he did take it, to bring it to the consul, or to announce it within three days. Hence we may understand what Modestinus says; *He who secretes booty taken from the enemy is guilty of peculation;* and this passage alone might satisfy juristical interpreters, that they are not to suppose that what individuals take from the enemy becomes their own: since peculation can only apply to property public, sacred, or religious. All these cases concur to make it appear, as we have said above, that setting aside the Civil Law, and primarily, things taken by military operations become the property of the people or king who are carrying on the war.

semota lege civili, et primo, in bellicis actibus capta populi aut regis bellum gerentis fieri.

XXII. 1 Addidimus semota lege civili et primo, sive directe: illud quia de rebus nondum actu quæsitis lex ad utilitatem publicam potest imperare, sive lex illa lex populi est, ut apud Romanos, sive regis, ut apud Hebræos et alibi. Sub legis autem nomine etiam consuetudinem recte introductam volumus comprehendi. Alterum illud eo pertinet, ut sciamus sicut res alias ita et prædam posse a populo aliis concedi, nec tantum post acquisitionem, sed et ante eam, ita ut subsecuta captura conjungantur actiones brevi manu, ut loquuntur jurisconsulti: nec tantum ea concessio nominatim fieri potest, sed et in genere, ut viduis, senibus, et egentibus pupillis pars prædæ data est temporibus Maccabaicis, aut etiam personis *Maccab.* viii. 28, 30. incertis ad exemplum missilium, quæ Romani consules capientium faciebant.

2 Neque vero hæc juris translatio, quæ lege aut concessu fit, semper mera donatio est, sed interdum contractus, interdum aut solutio ejus quod debetur, aut remuneratio ob damna quæ quis passus est, aut ob id quod ipse bello impendit, sive sumtu, sive opera, ut cum socii aut subditi nullo stipendio militant, aut non tali quod operæ respondeat. Nam ex his

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XXII. 1 I have added "setting aside the Civil Law, and primarily," that is, directly. The first clause, because concerning things not yet actually acquired, the law may regulate according to public utility; whether the law be made by the people, as among the Romans, or by the king, as among the Hebrews and elsewhere. And under the name of "law," I also include custom rightly introduced. The other clause, "primarily," tends to this: that we mean that spoil, like other things, may be conceded by the people to others, not only after acquisition, but also before; so that when the capture follows, the two events may be conjoined *brevi manu*, so as to be one, as the jurists speak. And such concession may be made, not only naming each person, but by classes; as in the times of the Maccabees, a part of the spoil was given to widows, old men, and needy orphans; or even to uncertain persons, as in a scramble, in which the Roman consuls gave things to those who caught them.

2 And this transfer of right (from the public to private persons,) which is made by law or concession, is not always a mere donation, but sometimes a contract, sometimes a payment of what is due, or a remuneration for losses suffered, or expenses incurred in the war, either in the way of payment or of work done; as when allies and

causis prædam aut omnem, aut ejus partem concedi solitam videmus.

Cald. *cons.* 85. Joh. Lupus *de Bell.* § *si bene advert.* Jason. *in l. quod apud host. de Leg.* 1. Franc. a Ripa *in l.* 1. *de acq. poss.* n. 5. Covar. *ad C. pecc.* p. 2. § 11. n. 8. Bonfin. iv. *dec.* 15. vi. *de Benef.* 15. *Inst. Orat.* xii. 7. *Ann.* xi. 7.

XXIII. Et illud quidem tacita consuetudine ubique ferme inductum jurisconsulti nostri notant, ut sua faciant quæ capiunt aut socii, aut [l]subditi qui sine stipendio et suo sumtu suoque periculum bellum gerunt. [m]Ratio in sociis est evidens, quia naturaliter socius socio tenetur ad reparationem damnorum quæ ob negotium commune aut publicum eveniunt. Adde quod opera quoque gratis præstari vix solet. *Sic medicis,* ait Seneca, *pretium operæ solvi quod deserviunt, quod a rebus suis avocati nobis vacant.* In oratoribus idem æquum judicat Quintilianus, quia hæc ipsa opera tempusque omne alienis negotiis datum facultatem aliter acquirendi recidunt: quod Tacitus dixit: *omitti curas familiares, ut quis se alienis negotiis intendat.* Credibile ergo est, nisi causa alia appareat, puta aut beneficentia mera, aut contractus antecedens, [n]spem ex hostibus lucrandi spectatam in damni et opera compensationem.

XXIV. 1 In subditis id non æque evidenter procedit,

[l] *Subditi qui sine stipendio et suo sumtu suoque periculo bellum gerunt*] Vide *Cromerum* xix. *Polonicorum.* (pag. 430.)

[m] *Ratio in sociis est evidens*] Utitur ea Amalasuntha in epistola ad Justinianum [apud Procopium] *Gotth.* i. (c. 3.)

[n] *Spem ex hostibus lucrandi spectatam in damni et operæ compensationem*] Vide Plutarchum *Marcello.* (pag. 302.)

[o] *De sociis exemplum est*] Priscis Latinis tertias prædæ populus Romanus

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subjects serve in the war without pay, or with pay insufficient to the work. For we see cases in which the whole booty, or a part of it, is assigned for such causes.

XXIII. And this we find that our jurists note as almost universally introduced by custom; that what is captured by allies or subjects who carry on the war without pay at their own risk, becomes theirs. The reason in the case of allies is evident; because, by Natural Law, ally is bound to ally for the reparation of losses which occur in the course of a common or public transaction. Add, that work is seldom done gratis. *Physicians are paid,* says Seneca, *because they leave their own business to attend to ours.* Quintilian thinks the same thing is reasonable in advocates, because by spending their time and strength on that office, they are prevented from making gain in other ways. So Tacitus. It is therefore presumable, except some other cause appear, for instance mere good will or antecedent contract, that this hope of getting gain from the enemy was looked to, as the compensation for loss and labour.

quia hi operam civitati suæ debent: sed contra occurrit quod ubi non omnes sed aliqui militant, his ipsis a corpore civitatis retributio debetur ejus quod plus ceteris operæ aut sumtus impendunt, multoque magis damnorum: in cujus retributionis certæ locum spes prædæ totius aut partis incertæ facile, nec sine ratione, conceditur. Sic Poëta, Propert. III. *Eleg.* iii. 21.

Præda sit hæc illis quorum meruere labores.

2 °De sociis exemplum est in federe Romano, quo Latini in prædæ partem æquam admittuntur in iis bellis, quæ populi Romani auspiciis gerebantur. Sic in bello quod Ætoli gerebant adjutoribus Romanis, Ætolis quidem urbes et agri, Romanis autem captivi et res mobiles cedebant. Post victoriam de rege Ptolemæo, partem prædæ Atheniensibus dedit Demetrius. Ambrosius historiam tractans Abrahami moris hujus æquitatem ostendit: *sane his qui secum fuissent, in adjumentum fortasse sociati, partem emolumenti tribuendam asserit, tanquam mercedem laboris.* Liv. ii. 33. et Dion. vi. 95. Polyb. xi. 5. et Liv. xxvi. 24; xxxiii. 13. Plut. *Demet.* p. 896 A. Lib. i. *de Abrah.* c. 3.

3 De subditis exemplum est in populo Hebræo, apud *Num.* xxxi. 27, 47. et 1 *Sam.* xxx. 22. *et deinceps.* Vide et 2 *Macc.* viii. 28, 30.

præstabat. Plinius Lib. XXXIV. 5. Pro modo missi militis prædam partiuntur pagi Helvetici, teste Simlero: pro modo sumtuum partiti Pontifex, Imperator, Veneti, bello contra Turcam. Paruta VIII. Pompeius Armeniam minorem Deiotaro Galatiæ regi donavit, quia socius belli Mithridatici fuerat. [Postremum istud habet Auctor ex EUTROPIO, *Breviar.* Lib. VI. cap. xi. Vide etiam STRABONEM, *Geogr.* Lib. XII. p. 547. *Ed. Paris.* *J. B.*]

XXIV. 1 In the case of subjects the argument is not equally obvious, because they owe their labour to the state. But on the other hand, when it is not all, but only some, who serve in war, these have a claim to retribution for the labour and expense which they incur beyond others, and still more, for the loss. And in the place of such certain retribution, it is not unreasonable to concede to them a hope either of the whole spoil, or of an uncertain part thereof. So the Poet Propertius.

2 We have an example, as to allies, in the Roman league, in which the Latins are admitted to an equal share of the spoil in the wars carried on under the auspices of the Roman people. So in the war which the Etolians carried on, the Romans helping them, the cities and lands were given to the Etolians, the captives and moveables to the Romans. After the victory over king Ptolemy, Demetrius gave a part of the spoil to the Athenians. Ambrose, in treating of the history of Abraham, shews the equity of this custom: *He gives to those who had been with him and helped him, a part of the gain as a reward of their labour.*

3 With regard to subjects, we have an example in the Hebrew

quem pars prædæ dimidia cedebat [p] his qui in procinctu fuerant. Sic et Alexandri miles prædam privatis ereptam suam faciebat, nisi quod eximia quædam solitus esset ad regem referre: unde accusatos eos videmus qui ad Arbela conspirasse dicebantur, de præda omni ita sibi vindicanda, ut nihil in ærarium deferrent.

Plut. *Apoph.* p. 180 c.

4 At quæ publica hostium aut regis fuerant, exemta erant huic licentiæ. Ita legimus Macedonas, cum Darii castra ad Pyramum amnem irrupissent, ingens auri argentique pondus diripuisse, nec quicquam reliquisse intactum [q] præter regis tabernaculum: *tradito more,* inquit Curtius, *ut victorem victi regis tabernaculo exciperent.* Unde non abit mos Hebræorum, qui victi regis coronam regi imponebant victori, eidemque assignabant (quod in Thalmudicis Digestis legitur) regiam supellectilem bello captam: et quod in rebus gestis Caroli Magni legimus, cum is Hungaros vicisset, privatas opes militi, regias ærario cessisse. At apud Græcos λάφυρα erant publica, ut ante ostendimus, σκῦλα singulorum. Vocant autem σκῦλα ea quæ durante certamine eripiuntur hosti, λάφυρα

Lib. iii. 11.

2 *Sam.* xii. 30.

Tit. de rege.

p *His qui in procinctu fuerant*] Pisidæ partem prædæ dabant his qui domos servarant. Chalcocondylas Lib. v.

q *Præter regis tabernaculum*] Vide

people, among whom half of the spoil went to those who were in service in the army. Thus also the soldiers of Alexander had for their use the booty taken from private persons, except that there was a custom of transferring to the king any object of peculiar value; and accordingly, we find that those who were said to have conspired at Arbela, were accused of intending to appropriate the whole of the spoil, and to give nothing to the treasury.

4 But what had been with the enemy, public property or king's property, was exempted from this licence. Thus we read that the Macedonians, when they stormed the camp of Darius at the river Pyramus, plundered a great mass of gold and silver, and left nothing untouched except the king's tent: *according to the established usage,* says Curtius, *that the conquered party should receive the conqueror in the king's tent.* And the usage of the Hebrews was not different, who put the crown of the conquered king on the head of the conqueror, and assigned to him (as we read in the Talmudic Collections) the royal furniture which was taken in the war. So, in the history of Charlemagne, we read that when he had conquered the Hungarians, the private treasure went to the soldiers, the royal, to the treasury. Among the Greeks there were two different words for public and private spoil, λάφυρα and σκῦλα. The latter implies what was taken

quæ post certamen: quod discrimen et aliis gentibus nonnullis placuit.

Arius *de Bell.* n. 162. Bellin. p. 2. tit. 18. n. 3. Donell. iv. *Com.* c. 21. Sylv. *in Verb. Bell.* 1. *in pr. ex* Rosell. Wesemb. *ad* § 17. *Inst. de rer. div.*

5 At apud Romanos veteri quidem republica non tantum fuisse concessum militibus, satis apparet ex his quæ supra diximus. Plusculum indulgeri cœpit militi in bellis civilibus. Ita a Sullano milite Æquulanum direptum legas. Et Cæsar post pugnam Pharsalicam castra Pompeiana militi dat diripienda cum hoc dicto apud Lucanum:

App. *Civ.* i. p. 380.

Lib. vii. v. 738, *et seqq.*

> Superest pro sanguine merces,
> Quam monstrare meum est; nec enim donare vocabo
> Quod sibi quisque dabit.

Bruti et Cassii castra diripuerunt Octaviani et Antoniani milites. Bello civili alio Flaviani ad Cremonam ducti, quanquam instabat nox, coloniam divitem festinant impetu capere; veriti alioqui ne opes Cremonensium in sinu præfectorum legatorumque essent, gnari scilicet, ut Tacitus loquitur, *expugnatæ urbis prædam ad militem, deditæ ad ducem pertinere.*

App. *Civil.* iv. p. 668.

Hist. iii. 19.

6 Atque id languescente disciplina eo libentius concessum militi, ne manente periculo omissis hostibus præda manus im-

et Diodorum libro XVII. (c. 35.) et Plutarchum *Alexandro* (pag. 676.) Similia vide apud Xenophontem IV. de Cyro, (cap. 6. § 6.) et belli sui IV. (cap. 4. § 13.) et VII.

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from the enemy during the contest; the former, what was taken afterwards; which distinction was also made by some other nations.

5 But among the Romans, there was not so much allowed to the soldiers under the old republic; as sufficiently appears from what we have said above. In the civil wars, they began to be more indulged. Thus we read that Equulanum was plundered by the soldiers of Sulla. And Cæsar, in Lucan, gives up the camp of Pompey after the battle of Pharsalia to be plundered. The soldiers of Octavius and Antony plundered the camp of Brutus and Cassius. In another civil war, the Flavians being led to Cremona, though night was at hand, hasten to storm that rich colony; fearing lest otherwise the wealth of the Cremonese should fall into the lap of the prefects and legates; knowing in fact, as Tacitus says, that *when a city is stormed, the booty belongs to the soldiers; when it is surrendered, to the general.*

6 In the decay of discipline, this concession to the soldiers was the more willingly made, lest they should, before the fight was over, turn away from the enemy to fall on the spoil, and so have their hands ill employed; a turn by which many victories were frustrated. When Corbulo stormed the strong place Volandum in Armenia, *the common people,* says Tacitus, *was sold by auction, the rest of the booty was given*

pediret, quod plurimas sæpe victorias corrupit. Cum castellum Volandum in Armenia Corbulo expugnasset, *imbelle vulgus*, Tac. *Ann.* xiii. 39. narrante Tacito, *sub corona venditum, reliqua prædæ victo-* *Ann.* xiv. 36. *ribus cessit.* Apud eundem scriptorem in prælio Britannico Suetonius suos hortatur, ut cædem continuent prædæ immemores: addens parta victoria cuncta ipsis cessura: qualia et alibi passim invenias. Adde quod [r]ex Procopio jam modo attulimus.

7 Sunt autem quædam tam exigua, ut publicari digna non sint. Hæc ubique solent capientes sequi populi concessu. Talia erant vetere Romana republica, hasta, hastile, ligna, pabulum, uter, follis, facula, et si quid minoris esset nummi argentei. Nam has exceptiones sacramento militari additas Lib. xvi. 4. apud Gellium legimus. Cui non dissimile est quod nautis *Const. Gall.* xx. *tit.* xiii. art. 10. et 16. etiam stipendio militantibus conceditur: Galli despoliationem aut pilagium vocant, et eo comprehendunt vestem, aurum quoque et argentum intra decem scutatos. Alibi pars aliquota *Leg. Hisp.* iv. *tit.* xxvi. p. 2. prædæ militibus datur, ut in Hispania, [s]modo quinta, modo tertia, alias dimidia penes regem manet: et septima, interdum

[r] *Ex Procopio*] Is *Vandalicorum* II. (cap. 21.) narrat, Salomoni in Levathas bellum gerenti infensos fuisse milites, quod prædam detineret. Dicebat id se facere ut bello finito distribueret pro cujusque meritis. Et *Gotthicorum* II. (c. 7.) omnem ex Piceno prædam convectam ad Belisarium qui eam pro meritis divideret; addita causa: *οὐ γὰρ δίκαιον ὑφ' ἑτέρων μὲν τοὺς κηφῆνας πόνῳ μεγάλῳ ἀπόλλυσθαι, ἄλλους δὲ τοῦ μέλιτος οὐδεμιᾷ ταλαιπωρίᾳ ὀνί-*

to the soldiers. In the same writer, Suetonius, in the Britannic battle, exhorts his men to continue the slaughter of the enemy without regarding the spoil; adding that when the victory is gained, all will be theirs; and the like you find in many other places. Add what we have just adduced from Procopius.

7 Some matters of booty are so small that they are not worth giving to the public. These are commonly allowed to belong to the captor by the permission of the people. Such, in the old republic of Rome, were the spear, javelin, firewood, food, water-bottle, scrip, link, and small money. For we find these exceptions added in Gellius to the military oath. And something similar was allowed sailors when serving in war: the French call this *spoil* or *pillage*, and comprehend in it clothing, and gold and silver within ten crowns. In some places, a certain fraction of the booty is given to the soldiers, as in Spain; sometimes a fifth, sometimes a third: in other cases, a half goes to the king; and a seventh, sometimes a tenth, to the general; the rest to the captors; except the ships of war, which go altogether to the king.

decima penes ducem exercitus: cetera sunt capientium: [t]exceptis navibus bellicis quæ totæ regi cedunt.

8 Est et ubi operæ, periculi, sumtuumque habita ratione partitio instituitur, ut apud Italos captæ navis pars tertia cedit domino navis victricis, tantundem ferunt quorum merces in navi erant, tantundem hi qui pugnaverunt. Nec non et illud accidit, ut qui suo periculo ac sumtu bellum ministrant non totam prædam auferant, sed partem debeant publico, aut ei qui ex publico jus suum trahit. Sic apud Hispanos si in bello naves privatis sumtibus instruantur, de præda pars regi, pars et maris præfecto debetur. Galliæ moribus decimam fert maris præfectus: sic et apud Hollandos: sed hic quinta prius prædæ pars a republica deducitur. Terra vero passim nunc usurpatur, ut in direptionibus oppidorum et præliis suum quisque faciat quod cepit: in excursibus vero capta communia fiant eorum qui in comitatu sunt, inter ipsos pro dignitatis ratione partienda.

Consulat. maris c. 285.

Leg. Hisp. xix. tit. xxvi. p. 2. l. 14.

Const. Gall. l. xx. tit. 14. art. 1.

Instruct. rei maritim. c. 22.

XXV. Hæc autem eo pertinent, ut sciamus si apud populum bello non permixtum controversia oriatur de re bello

νασθαι· non æquum esse ab aliis magno labore fucos interfici, alios autem sine ulla molestia melle vesci.

[s] *Modo quinta*] Eum et Turcis morem tribuit Leunclavius libro III. et libro V.

[t] *Exceptis navibus bellicis*] Sic machinæ bellicæ regibus exceptæ apud Gotthos. Johannes Magnus *Historiæ Suedicæ* libro XI. c. 11. [Nil ibi. *J. B.*]

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8 In some cases the partition is made, taking account of trouble, danger, and expense; as among the Italians, the third part of a captured ship goes to the captain of the victorious ship, a third part to the merchants to whom the cargo belonged, and a third part to the sailors. Also in some cases, those who fight at their own danger and expense do not take the whole booty, but are obliged to give a part to the public, or to those who derive their right from the public. So with the Spaniards, if ships are sent out at private expense, part of the prize goes to the king, part to the High Admiral. By the custom of France, the Admiral has a tenth; and so with the Hollanders; but here a fifth part of the booty is taken by the State. By land, the common use everywhere now is, that in pillage of towns, and in battles, every one makes his own what he takes; but in expeditions for booty, the captures are common to those who are in the company, and are divided according to their rank.

XXV. The tendency of these remarks is, that if, in a neutral nation, a controversy arises concerning things captured in war, they

capta, addicendam rem ei cui favent leges aut mores populi a cujus partibus res capta est: quod si ejus nihil probetur, ex jure gentium communi rem ipsi populo adjudicandam, si modo ea res in actu bellico capta est. Nam ex his quæ dicta jam ante a nobis sunt satis apparet non omnino verum esse id
Lib. v. 10. quod pro Thebanis adfert Quintilianus; in eo quod in judicium deduci potest nihil valere jus belli, nec armis erepta nisi armis posse retineri.

XXVI. 1 Quæ vero res hostium non sunt, [u] etsi apud hostes reperiantur, capientium non fiunt: id enim, ut jam
Hoc c. § 3. ante diximus, nec naturali juri congruit, nec jure gentium
Lib. xlv. 44. introductum est. Sic Romani Prusiæ dicunt: [x] *si is ager Antiochi non fuisset, eo ne populi quidem Romani factum apparere.* Si quod tamen in illis rebus jus habuit hostis quod possessioni connectatur, puta pignoris, retentionis, servitutis, id quo minus capientibus acquiratur nihil obstat.

[u] *Etsi apud hostes reperiantur*] Vide supra cap. iv. § 7.

[x] *Si is ager Antiochi non fuisset, eo ne populi quidem Romani factum apparere*] Sic nec Bocchi factus ager victo Jugurtha is qui non Jugurthæ

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are to be adjudged to those to whom they belong by the laws and customs of the people by whose party the capture is made. And if there is no proof on this point, then, by the common Laws of Nations, the thing is to be adjudged to the nation itself, provided it be taken in war. For from what we have said, it appears that the assertion of Quintilian is not exactly true, pleading for the Thebans; that in a matter which can be brought into a court of justice, the right of war goes for nothing; and that which is taken by arms can only be kept by arms.

XXVI. 1 Things which do not belong to the enemy, though they are found with the enemy, do not belong to the captors; for that, as we have said, is neither congruous to natural law nor established by the Laws of Nations. So the Romans say to Prusias, *If the land had not belonged to Antiochus, it would thence follow that it did not become the property of the Romans.* But if the enemy had any right over these objects, such as is connected with possession; as a right of pledge, retention, servitude, there is no reason why that should not pass to the captors.

2 This also is often made a question, whether things taken outside the territory of both belligerents become the property of the captors; which is controverted, both with regard to persons and things. If we regard only the Laws of Nations, I think the place is not to be considered; as we have said, that an enemy may be lawfully

2 Solet et hoc quæri, an extra territorium utriusque partis bellum gerentis capta fiant capientium: quod et de rebus et de personis solet in controversiam vocari. Si jus solum gentium respicimus, puto locum hic non considerari, sicut et hostem ubique recte interfici diximus. Sed qui in eo loco imperium habet, potest lege sua prohibere ne id fiat; et si contra legem factum sit, de eo tanquam de delicto poscere potest ut sibi satisfiat. Simile est quod in agro alieno capta fera dicitur capientium fieri, sed a domino agri prohiberi posse accessum. *L. 3. D. de adq. rer. domin. L. 16. D. De Servit. præd. rustic.*

XXVII. Jus autem hoc externum acquirendi res bello captas ita proprium est belli solennis ex jure gentium, ut in aliis bellis locum non habeat: nam in bellis aliis inter exteros res non acquiritur vi belli sed in compensationem debiti, quod aliter obtineri non potest. In bellis autem inter cives, sive magna ea, sive parva sint, nulla fit dominii mutatio nisi auctoritate judicis. Silv. *in verbo bell.* p. 1. § 3. et § 11. *vers. octavo.*

sed Bocchi [Massinissæ voluit dicere Auctor. *J.B.*] liberorum fuerat. Appianus exc. legationum 28. Simile vide apud Crantzium *Saxonicorum* XII. (cap. 7.)

slain anywhere. But he who has authority over the place, may by his law, prohibit such an act; and if it be done against the law, may require satisfaction. It is like the case in which a wild creature taken in another's land is said to be the property of the captor: but our access to it may be prohibited by the owner of the land.

XXVII. This external right*, however, of becoming the owner of things captured in war, is peculiar to a regular war according to the Laws of Nations, so that it does not obtain in other wars. For in other wars between strangers, a thing is not acquired by force of the war, but as a compensation for a debt which cannot otherwise be obtained. But in wars between citizens, whether they be great or small wars, there is no change of ownership without the authority of a judge.

* A right which exists between persons of different nations.

CAPUT VII.

DE JURE IN CAPTIVOS.

I. 1 SERVI natura quidem, id est, citra factum humanum aut primævo naturæ statu, hominum nulli sunt, [a] ut et alibi diximus: quo sensu recte accipi potest quod a jurisconsultis dictum est, contra naturam esse hanc servitutem: ut tamen facto hominis, id est, pactione aut delicto, servitus originem acciperet, justitiæ naturali non repugnat, [b] ut alibi quoque ostendimus.

L. 4. § 1. D. de statu hominum.

2 At eo de quo nunc agimus gentium jure aliquanto latius patet servitus, tum quoad personas, tum quoad effecta. Nam personas si spectamus, non soli qui se dedunt aut servitutem promittunt pro servis habentur: sed omnes omnino

[a] *Ut et alibi diximus*] Libro II. c. xxii. § 11.

[b] *Ut alibi quoque ostendimus*] Libro II. cap. v. § 27.

[c] *Belli lege*] Servius ad primum *Æneidos* (vers. 619) de Hercule: *a cujus portu cum eum Laomedon arceret, occisus est, et ejus filia Hesione belli jure sublata comiti Telamoni tradita est, qui primus ascenderat murum, unde Teucer natus est.* Idem ad X. *Æneidos* eandem narrans historiam: *Hesionem Græci*

CHAPTER VII. *Of the Right over Prisoners of War.*

I. 1 By nature, that is, in the primeval state of nature, and without the act of man, no men are slaves, as we have elsewhere said; and in this sense we may assent to what the jurists say, that slavery is against nature. But that slavery should have its origin in human act, that is, in convention or delict, is not repugnant to natural justice, as we have also shewn.

2 But by the laws of nations, of which we now speak, slavery is more comprehensive, both as to persons, and effects. For, if we regard the persons, it is not those only who surrender themselves, or promise slavery, who are reckoned slaves; but all persons whatever who are taken in a regular war, as soon as they are brought *intra præsidia*, as Pomponius says. Nor is delict requisite; the lot of all is

bello solenni publico capti, ex quo scilicet intra præsidia perducti sunt: ut ait Pomponius. Neque delictum requiritur, sed par omnium sors est, etiam eorum qui fato suo, ut diximus, cum bellum repente exortum esset, intra hostium fines deprehenduntur.

L. 5. § 1. D. de captivis. L. in bello. 12. D. de capt.

3 Polybius historiarum secundo: *τί δ' ἂν παθόντες οὗτοι δίκην δόξαιεν ἁρμόζουσαι δεδωκέναι; τυχὸν ἴσως εἴποι τις ἂν πραθέντες μετὰ τέκνων καὶ γυναικῶν, ἐπεὶ κατεπολεμήθησαν. ἀλλὰ τοῦτό γε καὶ τοῖς μηδὲν ἀσεβὲς ἐπιτελεσαμένοις κατὰ τοὺς τοῦ πολέμου νόμους ὑπόκειται παθεῖν· quid*, inquit, *patiendum his est ut justa supplicia pendant? dicat forte aliquis vendendos cum liberis et uxoribus quando armis victi sunt. At hæc* [c] *belli lege etiam illis ferenda sunt, qui nihil impii commiserunt.* Atque eo fit id quod Philo notat his verbis: *πολλοὶ πολλάκις καιροῖς ἀβουλήτοις τῶν σφόδρα ἀστείων τὴν ἐκ γένους ἀπέβαλον ἐλευθερίαν· multi viri boni variis casibus nativam amiserunt libertatem.*

Cap. 58.

Libro omnem virum esse bonum liberum, p. 866.

4 Dion Prusæensis, cum modos acquirendi dominii quosdam recitasset: *τρίτος δὲ κτήσεως τρόπος, ὅταν ἐν πολέμῳ λαβὼν αἰχμάλωτον τοῦτον τὸν τρόπον ἔχῃ καταδουλωσάμενον· ubi quem quis bello nactus captivum hoc modo servum factum possidet.* Sic pueros bello captos ab-

Orat. xv. p. 242 A.

Trojanis reddere noluerunt, dicentes se eam habere jure bellorum. (vers. 91.) Josephus libro xiv. *αἰχμαλωτισθέντας οὐ νόμῳ πολέμου· cum capti essent non belli jure.* (Cap. xii. § 2. *divis. Hudson.*) *τῷ τῶν δοριαλώτων νόμῳ.* Idem alibi: *δορυληπτῶν θεσμῷ, jure eo quod in captos constitutum est,* ait Menander Protector. (Pag. 91, 92. *Excerpt. Legat.* Edit. Hœschel.) Multa huc pertinentia habes capite præcedente: quia scriptores captas res captosque homines conjunguntur aut æquant.

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alike: even of those, as we have said, who by their destiny are found within the enemies' boundaries when war breaks out.

3 So Polybius says, *What punishment have these justly incurred? some one may say, when he sees men sold with their wives and children, when they have been conquered in war. These calamities are by the laws of war to be borne by those who have done no wrong.* And hence, as Philo notes, *many good men have, by various misfortunes, lost the liberty to which they were born.*

4 Dio Prusæensis, after reciting some modes of acquiring ownership, adds, When a person, having acquired another as a captive in war, holds him as a slave. So to carry off boys captured in war Oppian calls the Law of War.

ducere πολέμου νόμον vocat Oppianus de piscatu II. [vers. 316.]

II. Neque vero ipsi tantum servi fiunt, sed et posteri in perpetuum, nempe qui ex matre serva post servitutem nascuntur. Et hoc est quod jure gentium servos nostros fieri dixit Martianus, qui ex ancillis nostris nascuntur. Servitio subjectum uterum dixit Tacitus, agens de Germani ducis uxore.

L. 5. § 1. D. de statu hominum.
Ann. i. 59.

III. 1 Effecta vero juris hujus infinita sunt, ita ut in servum [1] domino nihil non licere dixerit pater Seneca. Nulla perpessio est quæ non impune servis illis imponatur, nulla actio quæ non quovis modo imperetur aut extorqueatur: ita ut etiam sævitia dominorum in serviles personas impunita sit, nisi quatenus lex civilis sævitiæ modum pœnamque ponit. *Apud omnes peræque gentes,* ait Caius, *animadvertere possumus dominis in servos vitæ necisque potestatem fuisse.* Addit deinde, fines huic potestati positos ex lege Romana, in solo scilicet Romano. Huc pertinet illud Donati ad Terentium, *quid non justum domino in servum?*

Lib. x. *contr.* 5.

L. 1. D. de his qui sui vel al. juris. Inst. de his qui sui vel alien. juris sunt.
Andr. act. 1. sc. 1. v. 9.

[1] Locus Senecæ non est e Lib. x. Contr. 5. ut ex prima Editione reposuimus (nam in aliis I. pro X. irrepserat) sed e Lib. v. Controv. 34. in qua idem argumentum tractatur, ut patet ex titulo: unde natus error Auctoris nostri. *J. B.*

[d] *Restringitur eorum sententia, qui dicunt incorporalia belli jure non acquiri*] Valerius Maximus lib. VI. cap. ix. num. 11. de Cn. Cornelio Asina: *qui consul a Pœnis apud Luparas cap-*

II. And not only do they themselves become slaves, but their posterity for ever; that is, those who are born of a slave-mother in slavery. And this is what Martianus says, that by the Law of Nations, those are born our slaves, who are born of our slave-servants. The womb was subjected to slavery, says Tacitus, speaking of the wife of a German leader: [Arminius, whose wife was pregnant when she came into the power of the Romans. *Gronov.*]

III. 1 The effects of this right are unlimited, so that the master may do any thing lawfully to the slave, as Seneca says. There is no suffering which may not be inflicted on such slaves with impunity; no act which may not in any manner be commanded or extorted; so that even cruelty in the masters, towards persons of servile condition, is unpunished; except so far as the Civil Law imposes limits and punishments for cruelty. *In all nations alike,* says Caius, *we may see that the masters have the power of life and death over slaves.* He adds afterwards, that by the Roman Law, limits were set to this power, that is, on Roman ground. So Donatus on Terence, *What is not lawful from a master to a slave?*

2 Sed et res omnes, quæ captæ fuerant, cum persona acquiruntur domino. Ipse servus qui in potestate alterius est, ait Justinianus, nihil suum potest habere. *Instit. per quas pers. cuique acq. § 3.*

IV. Unde refellitur aut certe [d]restringitur eorum sententia, qui dicunt incorporalia belli jure non acquiri. [2]Nam verum est non primo ac per se acquiri, sed media persona cujus ea fuerunt. Excipienda tamen sunt ea quæ ex singulari personæ proprietate fluunt ac proinde inalienabilia sunt, ut jus patrium. Hæc enim si manere possunt, manent penes personam: si non, extinguuntur.

V. 1 Atque hæc omnia jure gentium de quo agimus non aliam ob causam introducta sunt, quam ut tot commodis deliniti captores libenter abstinerent a summo illo rigore quo captos et statim, et post moram interficere poterant, ut ante diximus. [e]*Servorum appellatio,* inquit Pomponius, *ex eo fluxit, quod Imperatores captivos vendere ac per hoc servare nec occidere solent.* Dixi, ut libenter abstinerent: neque enim *L. 239. § 1. D. de V. S.*

tus cum belli jure omnia perdidisset. δοῦλος ἄκυρος πάντων καὶ ἑαυτοῦ, *servus, aliarum rerum dominium non minus quam sui ipsius perdidit.* Philo, libro omnem virum bonum esse liberum. (Pag. 871 c.) ⟦Add. c. præc. § 25.⟧

[2] Vide, in hanc quæstionem, PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. VIII. cap. 6. § 19. *J. B.*

[e] *Servorum appellatio ex eo fluxit*] Vide et Servium ad IV. *Æneidos,* ubi originem vocis *saltem* explicat. (in vers. 327.)

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2 And all the property which is taken becomes the right of the master, along with the person. The slave who is under the power of another, can have nothing of his own, says Justinian.

IV. Hence the opinion is refuted, or at least restricted, of those who say that incorporeal things are not acquired by right of war. For it is true that such property is not primarily and *per se* acquired, but it is acquired by the intervention of a person to whom it had belonged. We must except however rights which flow from a peculiar character of the person, and are therefore inalienable, as the paternal right. If these can remain at all, they remain with the person; if not, they are extinguished.

V. 1 All these powers are introduced by the Laws of Nations, for no other cause than this; that the captors, induced by so many advantages, may willingly abstain from the extreme rigour by which they were allowed to put captives to death, either immediately or after any delay, as we have said. *They are called servi,* says Pomponius, *because the conquerors commonly sell them, and so preserve them from being killed.* I have said that they may *willingly* abstain: for it is not a compact by which they are compelled to abstain, if you

quasi pactio est ut abstinere cogantur, si jus hoc gentium spectes, sed modus persuadendi ab eo quod est utilius.

2 Eademque ex causa hoc jus etiam in alios transcribitur, perinde ut rerum dominium. Ad natos autem dominium hoc porrigi ideo placuit, quia alioqui, si summo jure captores uterentur, illi ipsi nascituri non erant. Cui consequens est ut nati ante calamitatem, nisi ipsi capiantur, servi non fiant. Ideo autem natos maternæ esse conditionis placuit gentibus, quia serviles concubitus nec lege nec certa custodia erant constricti, ita ut nulla sufficiens præsumtio patrem indicaret. *L. 24. D. de statu hom.* Atque ita capiendum Ulpiani illud: *lex naturæ hæc est, ut qui nascitur sine legitimo matrimonio matrem sequatur*, id est, [3]lex consuetudinis generalis ab aliqua ducta ratione naturali, quomodo juris naturalis vocem abusione quadam *Lib. ii. 12. § 26.* interdum sumi alibi quoque demonstravimus.

3 Non frustra autem a gentibus introducta hæc jura, exemplo bellorum civilium intelligi potest, in quibus plerum-

[3] Videtur omnino Jurisconsultus intelligere heic verum jus Naturæ; et huc adludit locus CICERONIS, ab Eruditissimo SCHULTINGIO laudatus, *Not. in* ULPIAN. fragm. v. 8. *Ut enim, Jure Civili, qui matre est libera, liber est: item, Jure Naturæ, qui Dea matre est, Deus sit necesse est.* De *Nat. Deor.* III. 18. Volebant nimirum Jurisconsulti Veteres, ob incertitudinem Patris, liberos extra connubium natos, matris conditioni accedere, ex ratione naturali. Verum in iis quidem, qui re vera vulgo concepti sunt, hoc suadet ipsa Ratio naturalis: at non in iis, quorum Pater notus est, ut potest omnino esse eorum quos Mulier, quamquam serva, peperit. Nec citra præsumtionem civilem, magis

look at the Laws of Nations; but a mode of persuading them to adopt a more useful course.

2 For the same reason, this right is allowed to be transferred to others, like the ownership of things. And this right is extended so as to apply to the offspring, on this account; that otherwise, if the captors had used their extreme right, they would never have been born. From which it follows, that those born before the calamity, if they are not captured, do not become slaves. And therefore it was established that the children should follow the condition of the mother, because the cohabitation of slaves was not guarded, either by law or by sure custody, so that there could be no sufficient presumption to indicate the father. And in this sense we must take the dictum of Ulpian: *The law of nature is this, that he who is born out of legitimate matrimony follows the mother:* that is, the law of general custom, drawn from a natural reason; as we have shewn that the phrase *the law of nature* is elsewhere improperly used.

3 That these rights were not introduced in vain by the nations,

que videmus captos interfectos, quia in servitutem redigi non poterant: quod et Plutarchus notavit vita Othonis: et [f]Tacitus historiarum secundo. Pag. 1073 c. Cap. 44.

4 Ceterum populine an singulorum fiant qui capiuntur, ex his quæ de præda diximus definiendum est: nam homines hac in re jus gentium rebus æquavit. Caius jurisconsultus libro II. rerum quotidianarum: *item quæ ex hostibus capiuntur jure gentium statim capientium fiunt, adeo quidem ut et liberi homines in servitutem deducantur.* L. 5. et l. 7. D. de acq. rer. dom.

VI. 1 Quod tamen theologi nonnulli sentiunt, qui bello injusto capti sunt, aut ex captis nati, iis fas non esse fugere nisi ad suos, in eo eos falli non dubito. Id quidem interest, quod [g]si ad suos fugiant bello manente, libertatem consequuntur ex postliminii jure: si ad alios aut etiam pace facta ad suos, vindicanti domino reddendi sunt. Sed non ideo sequitur animo quoque injici [4]religionis vinculum: cum multa sint jura, quæ tantum exterius judicium spectant, qualia sunt Less. i. 5. dub. 5.

notus est et certus Pater, quem nuptiæ demonstrant: quæ præsumtio etiam cessat, ubi validior in contrarium ratio adparet, ut ex L. 6. D. *De his qui sui vel al. jur.* manifesto patet. *J. B.*

[f] *Tacitus historiarum secundo*] Et tertio, de Cremonensibus captis, *irritam prædam militibus fecerat consensus Italiæ.* (Cap. 34.)

[g] *Si ad suos fugiant bello manente, libertatem consequuntur ex postliminii jure*] Vide infra cap. ix. § 5. Plinius *Naturalis Historiæ* VII. 28. de M. Sergio: *bis ab Annibale captus, bis vinculorum ejus profugus.*

[4] Hoc verum est tantum, ubi nullum pactum inter Victorem, et bello Captum, intercessit. Diximus plura in Notis nostris Gallicis. *J. B.*

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we may understand by the example of civil wars, in which we commonly find the captives put to death, because they could not be reduced to slavery; as Plutarch and Tacitus note.

4 Whether those who are captured belong to the people or to individuals, is to be determined by what we have said of prize: for the laws of nations have put men on the footing of things, in this point. So Caius says, *What is taken from the enemy becomes forthwith,* jure gentium, *the property of the captors; and thus free men also are reduced to slavery.*

VI. 1 But what some theologians hold, that they who are captured in an unjust war, or born of such captives, have no moral right to escape, except to their own people, I do not hesitate to pronounce a mistake. There is indeed this difference; that if they escape to their own people while the war is still going on, they obtain their liberty by the right of *postliminium:* if they escape to others, or even to their own people after peace is made, they are to be restored

hæc belli jura quæ nunc exponimus. Nec est quod objiciat aliquis, ex dominii natura talem in animo obligationem sequi. Respondebo enim, cum multæ sint dominii species, posse et dominium dari quod tantum in judicio humano et quidem coactivo valeat: quod et in aliis juris generibus occurrit.

2 Tale enim aliquatenus et jus est testamenta nulla dicendi: [5]ob deliquium solennitatis alicujus quam jura civilia
Soto, *de just. et jure*, iv. q. 4. art. 3. Less. ii. 14. *dub.* 3. præscribant. Probabilior enim sententia est, etiam quod tali testamento relictum est retineri salva pietate posse: saltem quamdiu ei non contradicitur. Nec longe abit dominium ejus qui secundum leges civiles mala fide præscripsit: nam et hunc civilia judicia, ut dominum tuentur. Et hac distinctione facile solvitur nodus ille, quem Aristoteles nectit de cavillationibus
Lib. ii. 25. p. 308 D. libro II. cap. 5: ἆρα δίκαιον τὰ αὑτοῦ ἔχειν ἕκαστον; ἃ δ' ἄν τις κρίνοι κατὰ δόξαν τὴν ἑαυτοῦ, κἂν ᾖ ψευδής, κύρια ἐστιν ἐκ τοῦ νόμου. τὸ αὐτὸ ἄρα δίκαιον καὶ οὐ δίκαιον· *nonne jus est ut sua quisque habeat? at quæ ex animi sui sententia judex judicaverit,* [6]*ex lege rata sunt. Erit ergo idem jus et non jus.*

[5] Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. IV. cap. 10. § 7. *J. B.*

[6] Omissa heic, in omnibus Editionibus, hæc verba; *etiamsi falsa sint,* aut similia, quæ respondeant vocibus Græcis, κἂν ᾖ ψευδής, ut heic restituimus: nam mendose etiam in omnibus Editionibus concepta erant. *J. B.*

[h] *Poterant exigere fidem aut jusjurandum*] Bembus *Historiæ* libro X.

[7] Non videtur Paulus cogitasse de

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to their master on his claiming them. But it does not thence follow that they are under a bond of conscience: for there are many rights which only regard an external judgment; and such are those rights of war which we are now expounding. Nor is it a valid objection that such a bond arises from the nature of ownership. For I reply that there are many kinds of ownership; and that thus there may be ownership which is valid only in a human judgment, and that a coactive one: and this occurs also in other kinds of rights.

2 Such also, to a certain extent, is the right of annulling testaments, for defect of some formality which the Civil Law prescribes. For the more approved opinion is, that what is left me by such a testament, I may retain with a good conscience: at least as long as it is not contradicted. And nearly the same is the case of one who, according to the Civil Law, occupies a thing by prescription *malâ fide,* knowing that he had no right to it: for he too is protected in his ownership by the Civil Law. And by this distinction, we easily solve the knot which Aristotle proposes, *It is right that each one should have*

3 In nostra vero quæstione nulla causa fingi potest, cur gentes aliud spectaverint quam externum illud: nam facultas vindicandi servum, et cogendi, imo et vinciendi, et res ejus habendi, sufficiebat ut captis captores vellent parcere: aut si tam feri essent ut istis utilitatibus non moverentur, certe nec moturum eos fuerat vinculum aliquod animis injectum, quod ipsum tamen si omnino sibi necessarium crederent, [h] poterant exigere fidem aut jusjurandum.

4 Neque vero temere in lege, quæ non ex æquitate naturali sed majoris mali vitandi causa lata est, ea sumenda est interpretatio quæ peccato obnoxium faciat actum ceteroqui licitum. Florentinus Jurisconsultus, *nihil interest, quomodo captivus reversus est: utrum dimissus, an vi vel fallacia potestatem hostium evaserit.* Nimirum quia hoc jus captivitatis ita jus est, ut alio sensu plerumque et injuria sit, quo nomine et a Paulo jurisconsulto [7] nominatur: jus, quoad effectus quosdam: injuria, si id quod rei intrinsecum est spectetur. Unde et hoc apparet, si quis bello injusto captus in potestatem hostium venerit, ab eo non attaminari furti crimine animum,

L. Nihil. 19. *princ. D. de capt.*

L. 19. *princ. eod. tit.*

injustitia illa intrinseca: alias pro certo ponere debuisset, omnia bella Romanorum justa fuisse, quum nullum fuerit, in quo Jus Postliminii locum non haberet. Sed in L. 19. D. *de Capt. et Postlim.* verba illa, *ut qui* PER INJURIAM *ab extraneis detinebatur*, significant tantum *per vim*, sive justam, sive injustam, quod spectat ipsum Hostem: et eo sensu sumitur *per injuriam*, in L. 3. § 2. D. *Ad Leg. Jul. de vi privata*, ut adtendenti patebit. *J. B.*

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his own. But what the judge decides sincerely, even if wrong, is law. And thus the same thing would be right and not right.

3 But in our question, [whether a captive may escape,] no cause can be devised why nations should have imposed any bond beyond the external one. For the right of claiming a slave, of coercing him, even of putting him in chains, and of keeping his property, was sufficient to induce captors to spare their captives; or if they were so savage as not to be moved by these advantages, they would certainly not be moved by that mental bond; and even this, if they judged it necessary, they might demand as a promise or oath.

4 Nor are we lightly, in a law which is established, not upon natural equity, but for the sake of avoiding a greater evil, to assume an interpretation which would make unlawful an act otherwise lawful. So the Florentine Jurist; *It makes no difference how a captive returns, whether he has been set at liberty or escaped by art or force.* For in fact, this right of captivity is a right, in such a sense that in another sense it is commonly a wrong: as it is called by Paulus

si res suas subducat, [l] aut laboris sui mercedem si quam supra alimenta præstari æquum est: modo ipse neque suo, neque publico nomine quicquam debeat domino, aut ei cujus jus dominus acceperit. Nec refert quod fuga talis et subductio deprehensa graviter puniri soleant. Nam et hæc et alia multa faciunt potentiores, non quia æqua sunt, sed quia ipsis expedit.

Bannes 2, 2. q. 40.

5 Quod vero prohibent [k] canones nonnulli suadere servo ministerium domini sui destituere, si ad servos referas qui pœnam justam ferunt, aut voluntaria pactione se addixerunt, præceptum est justitiæ: sin ad eos qui bello injusto capti sunt, aut ex captis nati, ostendit Christianos Christianis auctores potius patientiæ esse debere, quam rei talis, quæ quamvis licita animos tamen a Christianismo alienos aut alioqui infirmos posset

C. si quis servum. 17. q. 4. c. 37. et c. *seq.*

[l] *Aut laboris sui mercedem*] Huc pertinent ea quæ a nobis ex Irenæo et Tertulliano allata sunt supra ad libri II. capitis VII. § 2 ubi de Hebræis agitur Ægypto egressis, ad quos et hoc Philonis pertinet de vita Mosis: *οἱ δ' ἐλαυνόμενοι καὶ διωκόμενοι, τῆς αὐτῶν εὐγενείας εἰς ἔννοιαν ἐλθόντες, τόλμημα τολμῶσιν ὁποῖον εἰκὸς ἦν τοὺς ἐλευθέρους καὶ μὴ ἀμνήμονας ὧν ἐπεβουλεύθησαν ἀδίκως. πολλὴν γὰρ λείαν ἐκφορήσαντες, τὴν μὲν αὐτοὶ διεκόμιζον ἐπηχθισμένοι, τὴν δὲ τοῖς ὑποζυγίοις ἐπέθεσαν, οὐ διὰ φιλοχρηματίαν, ἢ ὡς ἄν τις κατηγορῶν εἴποι, τὴν τῶν ἀλλοτρίων ἐπιθυμίαν. πόθεν; ἀλλὰ πρῶτον μὲν ὧν παρὰ πάντα τὸν χρόνον ὑπηρέτησαν, ἀναγκαῖον μισθὸν κομιζόμενοι. εἶτα δὲ ὑπὲρ ὧν κατεδουλώθησαν ἐν ἐλάττοσι καὶ οὐχὶ τοῖς ἴσοις ἀντιλυποῦντες·* et quæ ibi sequuntur plura. *Illi autem cum ejicerentur fugarenturque, nobilitatis suæ memores, rem incipiunt dignam viris ingenuis,*

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the jurist. It is a right, so far as certain effects are concerned; it is a wrong, if you look at the intrinsic nature of the thing. Whence this also appears; that if any one, captured in an unjust war, comes into the power of the enemy, he is not morally guilty of theft if he carries away his own property, or the reward of his labour, if there is any due beyond his aliment; provided that he do not owe any thing to his master, either on his own or on the public account, or to him whose right the master has received. Nor does it prove any thing, that such flight and subduction of property is commonly severely punished. For these and many like things are done by the more powerful, not because they are just, but because they are expedient.

5 The precepts in some of the Canons, forbidding persons to persuade a slave to leave the service of his master, if you refer them to slaves who are bearing a just punishment, or have made themselves slaves by a voluntary compact, are just precepts. But if you refer them to those who are captured in an unjust war, or born of such captives, the precepts tend to shew that Christians ought rather to

offendere. Similemque in modum accipi possunt apostolorum ad servos monita, nisi quod illa magis videntur obedientiam a servis exigere dum serviunt, quod naturali æquitati consentaneum est: nam alimenta et operæ sibi mutuo respondent.

VII. Ceterum ab iisdem, quos indicare cœpi, theologis illud dictum recte arbitror, servum domino jus illud externum exsequenti resistere illæso justitiæ officio non posse. [8] Est enim inter hoc et ea quæ diximus manifesta discrepantia. Externum jus, quod quidem non sola agendi impunitate sed et judiciorum tutela constat, inane erit si ex adverso resistendi jus maneat: nam si domino vi resistere licet, licebit et magistratui dominum tuenti, cum tamen magistratus ex jure gentium dominum in illo dominio ejusque usu defendere debeat. Est ergo hoc jus simile ei quod summis in quaque civitate potes-

nec oblitis eorum quæ per injuriam dolumque malum pertulerant: multa enim spolia partim ipsi exportarunt, partim imposuerunt jumentis, non per avaritiam, aut quod calumniator aliquis dixerit, alieni cupiditatem. Unde enim hoc illis? sed primum quidem ut ministerii tam longi temporis mercedem sibi necessariam haberent, deinde pro servitute per vim imposita pœnam non parem sed multo minorem expetentes. (Pag. 624.) Est similis historia Malchi viri sancti descripta ab Hieronymo in epistolis, et Langobardi Leuphis quam nobis dat pronepos ejus Paulus Warnafredi libro IV. (Cap. 39.) Adde si placet et confessionem editam sub Lanici Patricii nomine.

[k] *Canones nonnulli*] Ex synodo Gangrensi: vide quæ supra libro II. fine capitis V.

[8] Non satis heic cohærent Principia Auctoris nostri, ut in Notis nostris Gallicis ostendimus. *J. B.*

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encourage Christians to patience, than to a course which though lawful, may offend minds strangers to Christianity, or otherwise weak. And in the like spirit we must receive the exhortations of the Apostles to slaves, except that these seem rather to exhort them to obedience while they are slaves, which is agreeable to natural equity; for aliment and work done have a natural correspondence.

VII. But I think that another precept of the theologians whom I have begun to speak of is right: that a slave cannot, without violating the duty of justice, resist the master in the execution of that external right. For between this case and the other, there is a manifest discrepance. The external right, which consists not only in the impunity of the act, but is the protection of the right by the judicial tribunals, is void if the right of resisting on the opposite side remain. For if it be lawful to resist the master by force, it will be lawful to resist the magistrate who protects the master; and yet the magistrate, by the Law of Nations, ought to defend the master in his ownership and its exercise. This right, therefore, resembles that which we have elsewhere ascribed to the supreme authority in each state, that to resist

tatibus alibi tributum est a nobis, ut vi illis resistere licitum piumque non sit. Ideo et Augustinus utrumque conjunxit cum dixit: *ita a plebibus principes et a servis domini ferendi sunt, ut sub exercitatione tolerantiæ sustineantur temporalia, et sperentur æterna.*

VIII. Sed et hoc sciendum est, jus istud gentium de captivis nec semper receptum fuisse, nec apud gentes omnes: quanquam Romani jurisconsulti universaliter loquuntur, partem notiorem indigitantes totius nomine. Sic [l] apud Hebræos, qui specialibus institutis ab aliorum populorum communitate segregabantur, perfugium erat servis, nimirum, ut recte notant interpretes, his qui nulla sua culpa in eam calamitatem devenerant: quali ex causa videri potest ortum jus quod in solo Francorum servis datur proclamandi in libertatem, quanquam id nunc quidem non tantum bello captis, sed et aliis qualibuslibet servis videmus dari.

Deut. xxiii. 15.

Bodin. *de rep.* i. 5.

IX. 1 [m] Sed et Christianis in universum placuit bello in-

Bart. *in l.* 24. *D. de capt.* Covar. *in c. pecc.* p. 11, § 11. n. Vict. *de jure belli* n. 42. Boër. *decis.* 178. Silv. *in verb. bell.* 1. n. 1.

[l] *Apud Hebræos*] Vide præceptorum vetantium CLXXX.

[m] *Sed et Christianis*] Sed et Essenis, a quibus ortum primi Christiani duxere. Vide Josephum (*Ant. Jud.* Lib. XVIII. cap. 1, § 5.)

[n] *Gregoras*] Lib. iv. ubi hæc verba: *νόμος γάρ ἐστιν οὗτος ἄνωθεν ἐκ διαδοχῆς ἀεὶ κατιὼν εἰς τοὺς ἀπογόνους ἀκήρατος, οὐ μόνον Ῥωμαίοις καὶ Θετταλοῖς, ἀλλὰ καὶ Ἰλλυρίοις καὶ Τριβάλλοις καὶ Βουλγάροις, διὰ τὴν τῆς πίστεως ταυτότητα, τὰ μὲν πράγματα μόνα σκυλεύειν, τὰ δὲ σώματα μὴ ἀνδραποδίζεσθαι, μηδὲ φονεύειν ἔξω τῆς πολεμικῆς παρατάξεως μηδένα· mos hic est ab antiquo deductus ad posteros, nec corruptus unquam, non Græco-Ro-*

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them by force is not lawful or morally right. And so Augustine joined the two, when he said, *The common people must bear with princes, and slaves with their masters, that by the exercise of longsuffering, temporal things may be borne, and eternal things looked to.*

VIII. This also is to be noted; that this Law of Nations respecting captives, has neither been received always, nor among all nations; although the Roman jurists speak universally, pointing at the more known part by the name of the whole. Thus among the Hebrews, who were separated by special institutes from the common rules of other nations, there was a refuge for slaves (Deut. xxiii. 15): that is, as the commentators rightly note, for those who had fallen into that calamity by no fault of theirs. And from a like cause appears to have arisen the right which, in the Frankish land, was given slaves, of claiming to be free; although at present that is given not only to captives taken in war, but to slaves of every kind.

IX. 1 It has also been established among Christians in general,

ter ipsos orto captos servos non fieri, ita ut vendi possint, ad operas urgeri, et alia pati quæ servorum sunt: merito sane: quia ab omnis caritatis commendatore rectius instituti erant, aut esse debebant, quam ut a miseris hominibus interficiendis abduci nequirent, nisi minoris sævitiæ concessione. Atque hoc a majoribus ad posteros pridem transiisse inter eos, qui eandem religionem profiterentur, scripsit [n] Gregoras, nec eorum fuisse proprium qui sub Romano imperio viverent, sed commune cum Thessalis, Illyriis, Triballis, et Bulgaris. Atque ita hoc saltem, quanquam exiguum est, perfecit reverentia Christianæ legis, quod cum Græcis inter se servandum olim diceret Socrates, nihil impetraverat.

Lib. iv.

Plat. v. *de rep.* p. 469 c.

2 Quod autem hac in parte Christiani, idem et [o] Mahumetistæ inter se servant. Mansit tamen etiam inter Christianos mos captos custodiendi donec persolutum sit pretium, cujus æstimatio in arbitrio est victoris: nisi certi aliquid

Bart. *in l.* 12. *D. de neg. gestis.* Boër. *decis.* 178. *Const. reg. Hisp.* l. viii. *tit.* 26. *par.* 2.

manis modo et Thessalis, sed Illyriis quoque, Triballis et Bulgaris, propter fidei consortium, ut res quidem in prædam vertere liceat, homines autem nec captivos facere nec interficere extra prælii tempus. (Pag. 55. *Edit. Genev.* 1616.) Adamus Bremensis *de sancto Ansgario: inde Hammaburg reversus de venditione Christianorum Nordalbianos correxit.* Meminit hujus moris et Boërius decisione CLXXVIII. additque servari in Francia, Anglia, Hispania, ut si captus sit dux, comes, baro, is non militum sit, sed principis bellum gerentis.

o *Mahumetistæ inter se servant*] Chalcocondylas Lib. III. Leunclavius libro III. et libro XVII. Busbequius epistola exoticarum tertia. (pag. 162. *Edit. Elzev.*)

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that in cases of war, the captives are not to be made slaves so as to be sold, forced to work, or to suffer other things which belong to the condition of slaves: and most rightly: since they have been, or ought to be, better taught by the great teacher of all charity, than to be incapable of being withheld from killing wretched men except by the concession of some smaller cruelty. And we are told by Gregoras that this custom long ago passed from one generation to another of those who professed the same religion: nor was it peculiar to those who lived under the Roman empire, but common to them with the Thessalians, Illyrians, Triballians and Bulgarians. And this advance, at least, a small advance though it be, was produced by a reverence for the law of Christ, which, when Socrates formerly urged upon the Greeks, as a rule among themselves, he produced no effect.

2 The rule which the Christians follow in this matter, the Mahomedans also follow among one another. But there has remained among Christians the usage of keeping captives till a price is paid for

convenerit. Jus autem hoc captos servandi solet concedi singulis qui ceperunt, extra personas eximiæ dignitatis: in has enim reipublicæ aut ejus capiti jus dant plerarumque gentium mores.

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them, of which the appointment is in the will of the victor, except there be some certain convention. The right of retaining captives is usually given to those who have captured them, except persons of the highest rank: for with regard to them, the custom of most countries gives the right to the State or its Head.

CAPUT VIII.

DE IMPERIO IN VICTOS.

I. *Acquiri bello et imperium civile, tum ut est in rege, tum ut est in populo, et ejus acquisitionis effecta.*
II. *Acquiri et imperium herile in populum qui tum civitas esse desinit:*
III. *Interdum hæc misceri.*
IV. *Acquiri et res populi etiam incorporales, ubi tractatur quæstio de chirographo Thessalorum.*

I. 1 QUI sibi singulos subjicere potest servitute personali, nihil mirum est si et universos, sive illi civitas fuerunt, sive civitatis pars, subjicere sibi potest subjectione sive mere civili, sive mere herili, sive mixta. Hoc argumento quidam utitur in controversia de Olynthio apud Senecam: *servus est meus quem ego emi belli jure* [1] *vobis, Athenienses, expedit: alioquin imperium vestrum in antiquos fines redigitur quicquid est bello partum.* Itaque imperia armis quæri, victoriis propagari dixit Tertullianus. Quintilianus jure belli regna, populos, fines gentium atque urbium contineri. Alexander apud Curtium leges a victoribus dici, accipi a victis. Minio in oratione ad Romanos: *cur Syracusas*

Contr. 34. p. 390, *ed. Gronov. maj.*
Apolog c. 25.
Inst. Orat. v. 10.
Lib. iv. 5.
Liv. xxxv. 16.

[1] Locum istum, in Editt. et MSS. corruptum, ita restituit Vir Eruditissimus JOANNES SCHULTINGIUS: *Belli jure. Id tueri vobis, A. exp. alioquin—redigitur: quidquid est bello partum perdetis. Contra ait: Ille* &c. Mihi in prioribus verbis, *quem ego emi belli jure,* deesse videtur *captum,* aut quid simile. Neque enim Pictor servum belli jure emerat, sed venditum ab eo, cujus erat jure belli. *J. B.*

CHAPTER VIII. *Of authority over the Conquered.*

I. 1 Since the victor can subject individuals to personal servitude, it is not surprizing that he should be allowed to reduce a body of men, whether they be a State, or part of a State, to a servitude, either civil or domestic, or mixed. This is the argument used by some one in Seneca: *That he is my slave whom I have bought by the laws of war, is a rule expedient for you Athenians; otherwise your empire which has been gained by war is reduced within its ancient limits.* And accordingly, Tertullian says that empire is sought by arms and extended by victories: and Quintilian, that kingdoms, peoples, the boundaries of nations and of cities, are defined by wars. Alexander, in Curtius, says, that laws are given by the conquerors, and accepted by the conquered. So Minio in his speech to the Ro-

atque in alias Siciliæ Græcas urbes prætorem quotannis cum imperio et virgis et securibus mittitis? nihil aliud profecto dicatis, quam armis superatis vos iis has leges im-

De Bell. Gall. i. 36. *posuisse.* Ariovistus apud Cæsarem *jus esse belli* ait, *ut qui vicissent iis, quos vicissent, quemadmodum vellent, imperarent:* item, *populum Romanum victis, non ad alterius præscriptum, sed ad suum arbitrium imperare consuesse.*

Lib. i. 1. 2 Narrat Justinus ex Trogo, qui ante Ninum bella gesserant, *non imperium sibi sed gloriam quæsiisse, et contentos victoria abstinuisse imperio:* Ninum primum fuisse qui fines imperii proferret, aliosque populos bello subigeret: et ex eo id

De Bell. Jug. c. 110. abiisse in morem. Bocchus apud Sallustium: *ob regnum tutandum arma se cepisse: nam Numidiæ partem, unde Jugurtham expulerit, jure belli suam factam.*

3 Potest autem imperium victoria acquiri, vel tantum [a]ut

[a] *Ut est in rege*] Alexander post pugnam ad Gaugamela rex Asiæ salutatus. [Plutarch. *Vit. Alex.* pag. 685 B.] Romani quæ Syphacis fuerant sua dixere *πολέμου νόμῳ, lege belli.* Appianus excerptis legationum, n. 28. Legati Gotthorum apud Agathiam I. *de Theuderico: Ὀδοάκρον καθελὼν τὸν ἐπηλύτην τὸν Τύρηνον* (lege *Σκύῤῥηνον*) *τἀκείνου ἅπαντα κατέσχε τοῦ πολέμου θεσμῷ· cum Odoacrum devicisset advenam Scyrum, ejus quæ fuerant belli jure tenuit.* (Cap. 4.) At Hunnis dicentibus suos esse Gepidas, quod eorum regem cepissent, negarunt id Romani, quia Gepidæ habebant principem magis quam regem, nec in ipsius patrimonio erant. Meminit Menander Protector. (Pag. 130. *Ed. Hæschel.*)

[b] *Ut in populo est*] Persæ apud eundem Menandrum *de Daras urbis territorio: ἐπεὶ ἡ πόλις (Δάρας) αὐτοῖς τῷ θεσμῷ τοῦ πολέμου ὑπεκλίθη, οὐκ ἀπὸ τρόπου καὶ τὰ ὅσα γε ὑπὸ τὴν πόλιν, ἁρμόζειν αὐτοῖς· cum urbs ipsa belli jure subjugata a se esset, rationis esse ut et quæ sub urbe fuerant ad se pertineant.* (Pag. 98.) Vandalis de-

mans: *Why do you send to Syracuse and the other Greek cities of Sicily every year your prætor with the ensigns of office? You can only say that you have imposed those laws on conquered peoples.* So Ariovistus in Cesar.

2 Justin, from Trogus, relates, that those who made war, before Ninus, *did not seek empire but glory; and, content with victory, abstained from empire:* that Ninus was the first who extended the bounds of empire, and reduced other nations to his authority by war; and that thenceforth it became a custom. So Bocchus in Sallust, says, that *he had taken arms to defend his government; for that the part of Numidia from which he had expelled Jugurtha was his by the right of war.*

3 But authority may sometimes be acquired by victory, only so far as it exists in the king or other ruler: and in that case, the conqueror succeeds only to his rights, and no more: or as far as it is in the people; in which case the victor has the authority, in such a way that he

est in rege aut alio imperante, et tunc in ejus duntaxat jus succeditur, non ultra; vel etiam [b] ut in populo est: quo casu victor imperium habet, ita ut et alienare possit, sicut populus poterat. Et sic factum ut regna quædam in patrimonio essent, diximus alibi. Lib. i. III. § 11.

II. 1 Potest et amplius fieri, nempe ut, quæ civitas fuit, civitas esse desinat, sive ita ut accessio fiat alterius civitatis, ut Romanæ provinciæ, sive ut nulli civitati adhæreat, ut si rex suo sumtu bellum gerens populum sibi ita subjiciat, ut eum regi velit non ad populi sed ad regentis præcipue utilitatem, quod herilis est imperii, non civilis. Aristoteles lib VII. de republica; Cap. 14. ἔστι δὲ ἀρχὴ ἡ μὲν τοῦ ἄρχοντος χάριν, ἡ δὲ τοῦ ἀρχομένου. τούτων δὲ τὴν μὲν δεσποτικὴν εἶναί φαμεν, τὴν δὴ τῶν ἐλευθέρων· *imperium aliud est ob utilitatem regentis, aliud ob utilitatem ejus qui regitur: hoc inter*

victis volebat Belisarius etiam in Sicilia Lilybæum Romano imperio cedere, ut quod Vandalis dedissent Gotthi. Sed ii dedisse se negabant. Procopius *Vandalicorum* II. (Cap. 5.) Henricus Friderici Barbarossæ filius capta Sicilia Epidamnum, Thessalonicam, aliaque a Siculis possessa sibi vindicabat. Nicetas Lib. I. *de Alexio Isaaci Fratre.* (Cap. 9.) Baianus Avarorum Chaganus ad Imperatorem de Sirmio: προσήκειν αὐτῷ Γηπαίδων πρότερον κτῆμα γενομένην, αὐτῶν δὲ ὑπὸ Ἀβάρων πολεμηθέντων· *ad se eam urbem pertinere, ut quæ Gepidarum fuisset, qui Gepidæ victi essent ab Avaris.* (Menander, pag. 108.) Petrus Justiniani legatus in oratione ad Chosroem: ὁ γὰρ δεσπόσας τοῦ ἡγεμονικοῦ πῶς οὐχ ἕξει τὸ ὑποβέβηκος; οὔτε γὰρ Λάζοι, οὔτε μὴν αὐτοὶ Σουανοὶ πρὸς ἀμφισβήτησιν εἴποιεν, ὡς οὐχ ὑπήκοος ἡ Σουανία Λάζων ἀνέκαθεν ἦν· *nam qui dominus est principalis, quomodo non erit et accessorii? neque enim aut Lazi aut Suani unquam controversiam hanc movebant, non fuisse ab antiquo Lazorum Suaniam.* (Pag. 120.) Utrumque est ex Menandro Protectore. Adde quæ hoc capite, § 4.

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may alienate it, as the people could have done. And hence it comes to pass, that some kingdoms are patrimonial, as we have elsewhere said.

II. 1 But more may sometimes be effected by the right of conquest; namely, so that what was a state may cease to be a state; so that it may become an accessory part to another state, as the Roman provinces; or may be attached to no state, as if a king, carrying on a war at his own expense, subject a people to him in such a way, that he may direct it to be governed mainly to the advantage, not of the people, but of the governor; which is a character, not of civil government, but of a master over servants. So Aristotle: *Government is sometimes for the advantage of the governor, sometimes, of the governed: the latter has place among freemen: the former is the government of servants by a master.* The people which is so governed is, from the

liberos locum habet, illud inter dominos et servos. Qui ergo tali tenetur imperio populus, in posterum non civitas erit, sed magna familia : bene enim dictum ab Anaxandrida :

In Anchis. Excerpt. Grot. e vett. Comic. et Trag. p. 639.

Οὐκ ἔστι δούλων, ὦγαθ', οὐδαμοῦ πόλις.

Vir bone, servorum nulla est usquam civitas.

Ann. xii. 11. 2 Et Tacitus hæc inter se sic opponit: *non dominationem et servos, sed rectorem et cives cogitaret.* De Agesilao Xenophon: ὁπόσας δὲ πόλεις προσαγάγοιτο, ἀφαιρῶν αὐτῶν ὅσα δοῦλοι δεσπόταις ὑπηρετοῦσι, προσέταττεν ὅσα ἐλεύθεροι ἄρχουσι πείθονται· *quascunque civitates in suam redigebat potestatem, has immunes habens ab his quæ servi dominis præstant, ea tantum imperabat in quæ liberi homines rectoribus parent.*

cap. 1. § 22.

III. Atque hinc intelligi potest quale sit mixtum illud imperium quod dixi ex civili et herili, nempe ubi servitus miscetur cum aliqua personali libertate. Sic populis legimus arma ademta, imperatum [2] ne ferri quid haberent extra quam ad agriculturam; alios coactos sermonem et vitæ genus mutare.

[2] Hoc nominatim comprehensum erat in Fœdere, quod, expulsis Regibus, Populo Rom. dedit Porsenna, teste Plinio, *Hist. Nat.* Lib. xxxiv. cap. 14. *J. B.*

[c] *Ubi omnia ei qui armis plus potest dedita sunt*] Vide supra libro i. cap. iii. § 8. et Lib. ii. cap. v. § 31. et hoc libro cap. v. § 2. et infra cap. xx. § 49. et adde Polybii hæc excerpto legationum 142: οἱ διδόντες αὑτοὺς εἰς τὴν Ῥωμαίων ἐπιτροπὴν, διδόασι πρῶτον μὲν χώραν τὴν ὑπάρχουσαν αὐτοῖς καὶ πόλεις τὰς ἐν ταύτῃ. σὺν δὲ τούτοις ἄνδρας καὶ γυναῖκας τοὺς ὑπάρχοντας ἐν τῇ χώρᾳ καὶ ταῖς πόλεσιν, ἅπαντας ὁμοίως ποταμοὺς, λιμένας, ἱερὰ, τάφους συλλήβδην, ὥστε πάντων εἶναι κυρίους

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time of conquest, not a state, but a large family. For it was well said by Anaxandrides, that *slaves do not make a state.*

2 And Tacitus opposes these conditions to one another: *Not masters and slaves, but a governor and citizens.* So Xenophon of Agesilaus, that *he governed the cities which he reduced not as slaves under a master, but as free men obey their rulers.*

III. And hence we may understand what is that mixed government, compounded of mastership and civil rule, of which we have spoken; namely, when servitude is combined with a certain personal liberty. Thus we read of peoples whose arms were taken from them, and who were commanded not to possess any iron except for agriculture; and of others who were compelled to change their language and habits of living.

IV. 1 For, as the things which had belonged to individuals, do,

IV. 1 Sicut autem res, quæ singulorum fuerant, jure belli iis acquiruntur qui eos sibi subjiciunt, sic et res universitatis eorum fiunt qui sibi subjiciunt universitatem si ipsi velint. Nam quod de deditis dixit Livius, [c] *ubi omnia ei qui armis plus potest dedita sunt, quæ ex iis habere victor, quibus mulctari eos velit, ipsius jus atque arbitrium est:* idem in bello solenni victis locum habet. Nam deditio sponte permittit, quod alioqui vis esset ereptura. Scaptius apud Livium: *agrum de quo ambigitur finium Coriolanorum fuisse captisque Coriolis jure belli publicum populi Romani factum.* Annibal in oratione ad milites apud eundem: *quicquid Romani tot triumphis partum congestumque possident, id omne nostrum cum ipsis dominis futurum est.* Antiochus apud eumdem: *quo victo cum omnia quæ illius fuissent jure belli Seleuci facta sint, existimare suæ ditionis esse.* Ita Pompeius, quæ Mithridates bello capta imperio suo adjecerat, populi Romani fecit.

Lib. xxxiv. 57. Lib. iii. 71. Lib. xxi. 43. Lib. xxxiii. 40. Strabo, xii. p. 541.

2 Ergo et incorporalia jura, quæ universitatis fuerant, fient victoris quatenus velit. Sic Alba victa, quæ Albanorum

Ῥωμαίους, αὐτοὺς δὲ τοὺς διδόντας ἁπλῶς μηκέτι μηδενός· *qui se dedunt in Romanorum potestatem, ii dant primum regionem quæ ipsorum fuit, et quæ in ea regione sunt urbes: viros præterea omnes ac feminas qui aut in regione aut in urbibus sunt. Insuper flumina omnia, portus, sacra, religiosa universim omnia, ita ut omnium domini sint Romani, ipsi autem qui se dediderunt plane rei nullius.* Vide quæ modo dicta cap. vii. § 4. Justinus Lib. XXXVI. de Judæis loquens: *postea cum ipsis Persis in ditionem Alexandri Magni venere.* (Cap. 3.)

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by the laws of war, become the property of those who conquer them, so also the property of the general body becomes the property of the victors, if these so choose. What Livy says of persons who surrender, that *all things are surrendered to the conqueror, and that it is for him to decide what they may keep and what they must forfeit,* holds with regard to the conquered in war. For surrender gives up what would otherwise be taken by force. So Scaptius in Livy, of the land of Corioli. Annibal in his oration to his soldiers in the same historian, told them that all that the Romans had won would be theirs. So Antiochus said of the possessions of Seleucus. So Pompey took all that belonged to the empire of Mithridates.

2 And hence incorporeal rights also, which had belonged to the general body, become the rights of the victor, so far as he chooses. Thus when Alba was conquered, the Romans claimed what had been the rights of the Albans. Whence it follows that the Thessalians were altogether liberated from the obligation of a hundred talents, claimed

Dionys. Hal. *Ant. Rom.* iii. 31. jura fuerant sibi vindicarunt Romani. [3] Unde sequitur omnino liberatos Thessalos obligatione centum talentorum, quam summam cum ipsi Thebanis deberent, Alexander Magnus Thebarum dominus factus jure victoriæ ipsis donaverat: neque *Inst. Orat.* v. 10. verum quod pro Thebanis apud Quintilianum adfertur, id demum victoris esse quod ipse teneat: jus quod sit incorporale apprehendi manu non posse: aliam conditionem esse heredis, aliam victoris, quia ad illum jus, ad hunc res transeat. Nam qui dominus est personarum, idem et rerum est, et juris omnis *L.* 118. *D. de reg. jur.* quod personis competit. Qui possidetur non possidet sibi, *L.* 21. *D. ad l. Jul. de adult.* nec in potestate habet qui non est suæ potestatis.

3 Imo etiam si quis populo victo jus civitatis relinquat, potest quædam quæ civitatis fuerant sibi sumere. In ipsius enim arbitrio est quem velit esse sui beneficii modum. Imitatus fuit factum Alexandri Cæsar, donato Dyrrhachinis ære *Cic. epist. ad Brut.* 6. alieno, quod nescio cui adversarum partium debuerant. Sed hic objici poterat bellum Cæsaris [d] non ex eo esse genere, de quo jus hoc gentium constitutum est.

[3] Vide § 9. Capitis sequentis, et confer Pufendorfium, *De Jure Nat. et Gentium*, Lib. viii. cap. vi. § 20. *J. B.*

[d] *Non ex eo esse genere, de quo jus hoc gentium constitutum est*] Antonius Tyrios jussit reddere quæ Judæorum tenebant a senatu non concessa et ante Cassii bellum possessa. Memorat Josephus (*Ant. Jud.* xiv. 12. § 4. *divis. Hudson.*) Vide et Bizarum *Genuensis Historiæ*, libro x.

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by the Thebans; which sum Alexander the Great, having conquered Thebes, gave to them by the right of victory; nor is that true which is alleged for the Thebans in Quintilian: that that only belongs to the victor which he himself has in his hands; and that an incorporeal right cannot so be taken possession of: that the condition of an heir is different from that of a victor, because to the former the right passes, to the latter the thing only. For he who is lord of the persons, is lord of the things also, and of all things which belong to the person. He who is in the possession of another, has no possession for himself; and he who is not his own master, can be master of nothing else.

3 Even if any victor leave to the conquered people the rights of their state, he may take to himself some things which belonged to the state: for it depends on his own will what limit he chooses to fix to the benefits which he gives. Cesar imitated the act of Alexander, in remitting to the Dyrrachians the debt which they owed to some of the adverse party. But here it might be objected that the war of Cesar was not of that kind for which this law of nations was established.

CAPUT IX.

DE POSTLIMINIO.

I. *Origo vocis* postliminii.
II. *Quibus in locis postliminium sit.*
III. *Postliminio quædam reverti, quædam recipi.*
IV. *Jus postliminii esse in pace et in bello: et quid si nihil in pace dictum sit?*
V. *Liber homo, bello manente, quando postliminio redeat:*
VI. *Quæ jura recipiat, quæ non recipiat.*
VII. *Jura et in ipsum restitui.*
VIII. *Cur qui se dedant jus postliminii non habeant.*
IX. *Populus quando postliminii jus habeat.*
X. *Quæ in his qui postliminio redeunt sint juris civilis.*
XI. *Servi postliminio quomodo recipiantur, etiam transfugæ: quomodo qui redemti sunt.*
XII. *An subditi postliminio recipiantur.*
XIII. *Agros postliminio recipi.*
XIV. *Circa res mobiles quod discrimen olim observatum.*
XV. *Quid circa res mobiles hodie juris?*
XVI. *Quæ res recipiantur, ita ut postliminio non egeant.*
XVII. *Mutationes ex lege civili, quoad subditos suos.*
XVIII. *Postliminium quomodo observatum inter eos, qui hostes non erant:*
XIX. *Quando id hodieque locum habere possit.*

I. 1 SICUT de his quæ ex hostibus capiuntur, ita et de postliminii jure nihil ferme sani prodiderunt hi qui retroactis sæculis juris cognitionem professi sunt. Accuratius hæc res a veteribus Romanis tractata est, sed sæpe confuse nimis, ita ut quæ juris gentium, quæque civilis Romani esse vellent, lector nequiret distinguere.

2 De voce *postliminii* rejicienda Servii sententia, qui partem ejus posteriorem productionem putat esse verbi sine signi- Cicer. *Top.* c. 8. *et ibid.* Boëth.

Chapter IX. *Of Postliminium.*

I. 1 Those who in previous ages have treated of *jus*, as they have given no sound rules concerning captures from the enemy, so have they given no sound rules concerning *postliminium*. This subject was treated more accurately by the old Romans, but often too confusedly; so that the reader was not able to distinguish what belonged to the Laws of Nations, and what to the Civil or Roman Law.

2 With regard to the word *postliminium*, we must reject the opinion of Servius, who thinks that the latter part of the word is a lengthen-

ficatu: sequendus Scævola, qui junctum docebat esse verbum a [a] *post,* quod reditum notat, et *limine.* Nam *limen* et *limes* exitu et flexionis modo differunt, cum alioqui origine (veniunt enim [b] ab antiqua voce *limo,* quæ *transversum* significat) et primitiva notione idem sint, sicut materia et materies, pavus et pavo, [c] contagio et contages, cucumis et cucumer, quanquam usu seriore factum est ut *limen* magis ad privata, *limes* ad publica referretur. Sic veteres eliminare dicebant e finibus ejicere, et exilium [d] nominabant eliminium.

II. 1 Est ergo postliminium jus quod nascitur [e] ex reditu in limen, id est, fines publicos. Sic Pomponius reversum postliminio ait qui intra præsidia nostra esse cœpit: Paulus cum in fines nostros intraverit. Sed ex paritate rationis consensus gentium rem eo perduxit, ut postliminium locum haberet, etiam si quis homo, aut res ejus generis in quo postliminium esse placuerat, pervenisset ad amicos nostros, ut loquitur dicto

L. 5. § 1. D. de capt.
L. 19. § 3. ib.

[a] Post, *quod reditum notat*] Unde *Postvorta Dea.* [quæ præerat partui mulierum. Vide AUL. GELL. *Noct. Attic.* Lib. XVI. cap. 17. *J. B.*]

[b] *Ab antiqua voce* limo] Servius ad XII. *Æneidos,* et Donatus ad illud *Eunuchi* (III. 5. 63.) *limis oculis.* Festus: *Limus, obliquus, id est, transversus, unde et limina.* Isidorus libro XV. cap. 14. *limites appellati antiquo verbo transversi: nam transversa omnia antiqui lima dicebant, a quo et limina ostiorum, per quæ foris et intus itur: et limites, quod per eos foras in agros eatur.* In Glossario *limes* πλαγία ὁδός.

[c] *Contagio et contages*] *Compages et compago,* quod ipsum olim fuit *compagen,* ut docet genitivus, et verbum inde deductum, sicut et *sanguis* fuit *sanguen.*

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ing of the former, without signification. We must follow Scævola, who taught that the word was compounded of *post,* implying a return, and *limen.* For *limen, a threshold,* and *limes, a boundary,* differ in their ending and declension, but otherwise are the same in their primitive notion and origin; for they come from the old word *limo,* which signifies *transversum, across:* like *materia* and *materies; pavus* and *pavo; contagio* and *contages; cucumis* and *cucumer;* although in later usage, it came to pass that *limen, a threshold,* was referred more to private things, *limes, a boundary,* to public. So the ancients used *eliminare,* meaning to expel from the bounds of the state, and exile they called *eliminium.*

II. 1 *Postliminium,* then, is the right which arises from returning *in limen,* that is within the boundaries of the state. Thus Pomponius says, *he* is returned by postliminium who has begun to be within our *præsidia;* Paulus, when he has entered our boundaries. But by parity of reason, the consent of nations led to the rule that postliminium should hold, if any man or any thing to which civil rules apply, comes to our friends or allies, as the same two jurists also say. And here

loco Pomponius, aut, ut Paulus exempli causa explicat, ad regem socium vel amicum. Quibus in locis [f] amici aut socii intelligendi sunt non simpliciter quibuscum pax est, sed qui partes in bello easdem sequuntur: ad quos qui venerunt, ut Paulus loquitur, nomine publico tuti esse incipiunt. Nihil enim interest, homo aut res, ad hos, aut ad suos pervenerit.

2 Apud eos vero qui amici sunt, sed non earundem partium, bello capti statum non mutant nisi ex speciali pacto: quomodo in secundo federe icto inter Romanos et Carthaginienses Polyb. iii. 24.
convenerat, ut qui a Carthaginiensibus capti e populis amicis Romanorum in portus Romanis subditos venissent, in libertatem vindicari possent: utque Carthaginiensium amicis par jus esset. Ideo [g] qui Romanorum bello Punico secundo capti in Plut. *Flam.* pp. 376, 377.
Græciam commercio pervenerant, jus ibi postliminii non habuerunt, quia Græci in eo bello neutras secuti fuerant partes: ac propterea opus fuit eos redimi ut liberarentur. Quin et apud

[d] *Nominabant eliminium*] Et *colliminium* in Solino (Cap. 15. vel 25.) est quod vulgo *collimitium.*

[e] *Ex reditu in limen*] Hinc sumta translatione *postliminium ecclesiasticæ pacis* dixit Tertullianus *de Pudicitia.* (Cap. 15.)

[f] *Amici aut socii intelligendi sunt non simpliciter quibuscum pax est*] Ita sensisse Maroci et Fesæ regem apparet ex Thuani libro CXXX. in anno cIɔ Iɔc III.

[g] *Qui Romanorum bello Punico secundo capti in Græciam commercio pervenerant, jus ibi postliminii non habuerunt*] Valerius Maximus Lib. v. cap. 11. n. 6. Diodorus Siculus excerpto legationum n. 3. Sic et Rhodii quos Atheniensium cives bello Philippi emerant, liberaliter Atheniensibus reddidere. Polybius excerpto legationum n. 3 [c. *hist. des Anc. trait.* Part. 1 art. 251. *J. B.*]

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our friends and allies are to be understood, not simply those with whom we are at peace, but those who are of our party in the war. Those who come to such are safe, as if they, man or thing, came to their own people.

2 Coming among those who are friendly, but not of the same party, prisoners of war do not change their condition, except by special compact. As in the second league made between the Romans and Carthaginians, it was agreed that those of the peoples, friends of Rome, who were taken prisoners by the Carthaginians, if they came into ports subject to the Romans, might claim their liberty; and that the friends of the Carthaginians should have a like right. Therefore those of the Romans in the second Punic war, who, being prisoners, came into Greece on commercial designs, had not there the right of postliminium, because the Greeks, in that war, had taken part with neither side: and therefore it was necessary for them to be ransomed, in order to regain their liberty. In Homer too we see prisoners of war sold in neutral places, as Lycaon, *Iliad* XX. Eurymedusa, *Odyssee* VIII.

v. 35, *et seqq.* v. 8, *et seqq.* Homerum non uno in loco videmus bello captos in locis pacatis venditos, ut Lycaonem *Iliados* Φ; Eurymedusam *Odysseæ* H.

III. Vetus Romanorum locutio receptos postliminio etiam Fest. Pomp. *voce Post.* homines liberos dicebat. *Postliminio receptum* (ita enim legendum est) *Gallus Ælius in libro prima significationum quæ ad jus pertinent, ait esse eum, qui liber e qua civitate in aliam civitatem abierat, in eandem civitatem redit eo jure quod constitutum est de postliminiis. Item, qui servus a nobis in hostium potestatem pervenit, postea ad nos redit in ejus potestatem cujus antea fuit, jure postliminii. Equi et muli et navis eadem ratio est in postliminii receptu* (ita tria hæc verba, quæ delenda censet vir incomparabilis in Romani juris studio Jacobus Cujacius, levi mutatione retineri posse arbitror) *quæ servi: quæ genera rerum ab hostibus ad nos postliminio redeunt, eadem genera rerum a nobis ad* L. 14. D. *de capt. et postl. rev.* *hostes redire possunt.* Sed posteriores Romani jurisconsulti discrete magis duas statuerunt species postliminii, ut aut nos revertamur, aut aliquid recipiamus.

L. 12. D. *eod. tit. d. l. postl.* IV. 1 Retinendum et illud Tryphonini, qui postliminii jus competere ait in bello aut in pace: sensu paulo alio

h *His qui non virtute bellica superati, sed fato suo deprehensi sunt*] Vide exemplum apud Parutam *belli Cyprii* Lib. I.

1 Vide supra, cap. 6. hujus Libri, § 12. num. 1. *J. B.*

i *Nisi id pactis erat comprehensum*] Vide Josephum *Antiquæ Historiæ* XIII. 2. Polybius pacta ponit comprehendentia ut captivi redderentur in pace Philippi, Ætolorum, cum exceptione tamen, et Antiochi: excerptis de legationibus 9, 28, 35. Eadem exempla habet Livius, et præterea pacis cum Nabide. (Lib. XXXIV. cap. 35.) Similia aliquot suppeditat Zosimus. Ut ecce Probi pax cum Vandalis et Burgundis sic inita: ἐφ' ᾧτε καὶ τὴν λεία καὶ τοὺς αἰχμαλώτους, οὓς ἔτυχον ἔχοντες, ἀποδοῦναι· *ut et prædam omnem et quoscumque habebant captivos redderent.* Lib. I. (cap. 69.) similem pacem narrat Juliani cum Germanis, (Lib. III. cap. 4.) item cum Quadis qui in Germania, libro III. [Cap. 7. Sed ibi nihil tale.] Ammianus Marcellinus libro XVII. de rege

III. The old phraseology of the Romans spoke of free men also as received by *postliminium*, namely, if a man went to another city and then returned to his own. Also servants, horses, mules, ships which fell into the enemy's hands, and were then retaken, were recovered by postliminium. The later jurists made two kinds of postliminium: that by which we ourselves return, and that by which we recover anything.

IV. 1 The right exists in war and in peace. In peace, it belongs to those who, when the war breaks out, are among the enemy. Other prisoners of war have not postliminium, except that be agreed upon.

quam quo idem dixerat Pomponius. In pace postliminium, nisi aliter convenerit, est [h] his qui non virtute bellica superati, sed fato suo [1] deprehensi sunt, ut qui cum bellum subito exarsit apud hostes reperiuntur. Aliis autem captivis in pace postliminium non est, [i] nisi [2] id pactis erat comprehensum, ut optime eum Tryphonini locum emendat doctissimus Petrus Faber, non improbante Cujacio: nam hoc et subjecta ratio et oppositum membrum aperte evincunt. *Pacem fecerat captivis dimissis, ita enim convenerat,* inquit Zonaras. Et Pomponius: *si captivus, de quo in pace cautum fuerat ut rediret, sua voluntate apud hostes mansit, non est ei postea postliminium.* Paulus: *si in bello captus pace facta domum refugit, postliminio redit ad eum a quo priore bello captus erat: si modo non convenerit in pace, ut captivi redderentur.*

Sem. I. 7.

Tom. III.

L. 20. D. de capt.

L. 28. d. tit.

2 Causam cur de his qui bellica virtute capti sunt id placuerit ex Servio hanc affert Tryphoninus, *quia spem revertendi civibus in virtute bellica magis quam in pace Romani esse voluerunt,* nimirum ut Livius loquitur ab antiquo minime indulgens in captivos civitas. Sed hæc ratio Romanorum pro-

Lib. XXII. 59.

Alemanorum Suomario: *pacem genibus curvatis orabat: et eam cum concessione præteritorum sub hac meruit lege, ut captivos redderet nostros.* (Cap. 10. p. 188.) Mox de Sarmatis: *jussi obtinere sedes impavidi nostros reddidere captivos:* (Cap. 12.) de alia rursum Sarmatarum parte idem dicit. Apud Zonaram multa talia: inter cetera in rebus Michaëlis qui filius Theophili, de Bulgaro loquens: τοὺς αἰχμαλώτους ἐλευθερῶσαι συνέθετο· *promisit captivis se daturum libertatem.* [Lib. XVI. cap. V. pag. 163. *Edit. Reg.* Idem est locus, qui in contextu paullo post latine adfertur.] Nicetas libro II. (cap. 3) captivis omnibus libertatem ait datam, exceptis Corinthiis et Thebanis viris ac mulieribus. Interdum convenit ut reddantur captivi qui a republica possidentur, ut apud Thucydidem V. (cap. 18.)

[2] Hanc emendationem, *id,* pro *nihil,* necessariam non esse, ostendit Ampliss. BYNCKERSHOEK, *Obs.* Lib. I. cap. 20. *J. B.*

So Triphoninus, emended; and Zonaras. Pomponius says, *If a prisoner of war, being allowed by treaty to return, chooses to remain with the enemy, he loses postliminium.* Paulus says, *If a captive of war, after peace is made, escapes to his home, by postliminium he returns to the master to whom he was captive during the war, except there be a convention that captives are to be returned.*

2 The reason why captives taken in war are thus allowed to remain in the enemy's hands, is given by Tryphoninus; *That they might place their hope of returning rather in valour than in peace, was the wish of the Romans:* the city having little indulgence for captives, as

pria non potuit constituere jus gentium: potuit tamen inter causas esse, cur Romani illud jus ab aliis gentibus introductum et ipsi amplecterentur. Verior hæc est ratio, quod reges aut populi qui bellum suscipiunt, credi volunt justas sibi fuisse causas cur id facerent: contra autem, injuriam facere eos qui adversum se arma ferrent: quod cum utraque pars credi vellet, nec tutum esset pacem servare cupientibus huic se controversiæ interponere, nihil melius facere potuerunt populi pacati, quam [k] ut id quod evenisset pro jure acciperent: atque ita captos in actu repugnandi haberent quasi ex justa causa captos.

3 At de his qui bello exorto deprehensi erant dici idem non poterat: [3] nam in illis nullum injuriæ consilium fingi poterat. Tamen ad minuendas hostium vires retineri eos manente bello non iniquum videbatur: bello autem composito nihil obtendi poterat quominus dimitterentur. Itaque consensum in hoc est, ut tales in pace semper libertatem obtinerent, ut confessione partium innocentes: in ceteros vero ut quisque usurparet quod vellet credi jus esse, nisi quatenus pacta

[k] *Ut id quod evenisset pro jure acciperent*] Vide Priscum excerpto de legationibus 28. et Bizarum de bello Genuensium in Venetos libro II. [Priscus *l. l.* agit de fœdere inter ducem Maximinum et Blemyas et Nubrades, gentes Æthiopiæ, in quo hi promiserunt omnes Romanos, quacunque etiam in expeditione capti fuissent Orientis imperatori absque lytro restituere. *J. B.*]

[3] At supra, cap. 7. hujus Libri, § 1. Auctor statuit, etiam eos, qui, bello exorto, intra hostium fines deprehenduntur fato suo, servos fieri. Deinde, neque ullum injuriæ consilium in impuberibus, qui tamen etiam, jure belli, in servitutem rediguntur, secundum Auctorem nostrum. Plura diximus in Notis nostris Gallicis. *J. B.*

[l] *Nec servi*] Totilas Pelagio Diacono a Romanis ad se misso edicit ne de reddendis Siculorum servis verba faciat, dicens iniquum fore ut Romani [immo Gothi *J. B.*] commilites suos veteribus dominis dedant. Locus est Procopii *Gotthicorum* III. (Cap. 16.)

[m] *In bello redeunt postliminio homines, qui antequam caperentur liberi*

Livy says. This reason being peculiar to the Romans, could not be the reason for the law of nations: but it might be among the reasons why the Romans took such a rule from other nations. But the truer reason is, that the belligerents are regarded as if their wars were just, and neutrals cannot safely interpose, and must therefore acquiesce; and so, must reckon actual captives as justly captives.

3 But with regard to those who were caught among the enemy when the war broke out, the same could not be said: for they could not be conceived to have done any wrong. Yet to diminish the strength of the enemy, they were retained while the war lasted. These then, by the consent of nations, were to be liberated, on the arrival of peace, as innocent; but other prisoners to be regulated by laws of

certi aliquid præscriberent. Atque eandem ob causam [l] nec servi, nec res bello captæ pace redduntur, nisi pactis expressum id sit: quia victor credi vult jus sibi fuisse ista quærendi: cui contradicere, id vero fuerat bella ex bellis serere: ex quibus apparet ingeniose non ex vero allatum illud apud Quintilianum pro Thebanis: ideo captivos si in patriam suam redierunt, liberos esse, quia bello parta non nisi eadem vi possideantur. Diximus de pace. *Inst. Orat. v. 10.*

4 [m] In bello redeunt postliminio homines qui antequam caperentur liberi fuerant: recipiuntur servi et alia quædam.

V. Liber homo ita demum postliminio redit, si hoc animo ad suos venerit ut eorum res sequeretur, ut a Tryphonino proditum est: nimirum quia, ut quis servus liber fiat, se debet, ut ita dicam, acquirere, quod non est nisi volentis. Ceterum [n] an vi bellica receptus sit ab hostibus, an dolo profugerit, nihil refert, ut a Florentino notatum est. Tantundem erit si ab hostibus sponte sit traditus. Quid [o] si ab hoste venditus commercio, ut fit, ad suos pervenerit? Tractatur hæc controversia [p] apud Senecam in Olynthio quem

D. l. in bell. 12. § manumittendo. 9. et l. postlim. 5. § captiv. 3. D. de capt.

L. nihil. D. de capt.

L. cum non redemt. 5. C. de postl. rev.

fuerunt] Julianus oratione in malos Cynicos: *οὔτω μὲν ἂν εἶεν οἰκέται καὶ ὁπόσους τῶν αἰχμαλώτων λυτρούμεθα. καί τοι οἱ νόμοι τούτοις ἀποδεδώκασι τὴν ἐλευθερίαν σωθεῖσι καὶ οἴκαδε· hoc modo servi essent, etiam quos bello captos liberamus. Atqui talibus ubi ad nos redierint libertatem adjudicant leges.* *Orat.* VI. pag. 195, 196. *Edit. Spanhem.*)

[n] *An vi bellica receptus sit ab hostibus*] Ut illi quos a Slavis captos liberavere Hunni, apud Procopium itidem *Gotthicorum* III. (Cap. 13. ubi non Hunni, sed Heruli.)

[o] *Si ab hoste venditus commercio, ut fit, ad suos pervenerit*] Ut eodem Procopii libro juvenis Childubius, *τὰ νῦν δὲ, ἐπεὶ ἀφίκετο εἰς πάτρια ἤθη, ἐλεύθερος τὸ λοιπὸν κατάγε τὸν νόμον καὶ αὐτὸς ἔσται· dicebat, se cum in patriam rediisset liberum ex jure in posterum fore.* (Cap. 14.) At apud Turcas nullum olim fuisse captivis postliminium notat Leunclavius.

[p] *Apud Senecam*] Libro v. controversia 34.

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war, except so far as regulated by compact. And for the same reason, slaves and other property are not restored at peace, except by compact; for they are supposed to be taken by right, and to deny this, would be to make wars grow out of wars. Whence it appears that what is alleged by Quintilian for the Thebans, is ingenious, but not true.

4 By postliminium in war, those who were free men before their capture, *return;* slaves and things are *recovered.*

V. A free man returns by postliminium, if he comes to his own party with this intent: inasmuch as, in order that a slave [or a captive] may become free he must, so to speak, acquire himself, which cannot be done without his will. But whether he be recovered from the enemy by warlike force, or make his escape, makes no difference, as is

Parrhasius emerat. Quærit enim cum decretum factum esset ab Atheniensibus quo Olynthii juberentur liberi esse, hoc [4] contineretur liberi ut fierent, an ut liberi judicarentur; quorum hoc est verius.

VI. 1 Liber autem homo, postquam ad suos rediit, non se tantum sibi acquirit, sed et res omnes quas habuerat apud populos pacatos, sive corporales, sive incorporales. Quia populi pacati, sicut factum pro jure secuti erant in capto, ita et in liberato, ut se æquos præbeant utrique parti. Ergo dominium quod habuerat in res ejus is, qui belli jure eum possidebat, non erat sine omni conditione: cessare enim poterat ipso invito, si captus qui fuerat ad suos pervenisset. Has ergo res sic ille perdit, quomodo hominem cujus erant accessio.

2 Quid si tamen alienasset? an qui titulum habet ab eo qui belli jure eo tempore erat dominus, tutus erit gentium jure, an et hæc recuperabuntur? de his loquor quæ apud populum belli medium exstabant. Distinguendum videtur inter res, quæ ejus sunt generis ut postliminio redeant, et quæ

[4] Debuit heic dicere, *utrum hoc etc.* quod forte omissum a Typographis. *J. B.*

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noted by Florentinus. The same follows if he be spontaneously given up by the enemy.

But what is the result if he be sold by the enemy in the usual way of traffic, and so come to his own people? This controversy is treated by Quintilian, with reference to the Olynthian, whom Parrhasius had bought. For a decree having been made by the Athenians that the Olynthians should be free, he enquires whether this means that they should become free, or should be adjudged to be free: of which the latter is the more true opinion.

VI. 1 Moreover a free man, after he has returned to his own people, acquires, not only himself, but all the property which he had in a neutral State, both corporeal and incorporeal. For the neutral State, as they took the fact for law in the case of captivity, must do the same in the case of liberation, to shew themselves impartial to both parties. Therefore the right, which he who possessed him by the law of war, had over his property, was not altogether without conditions: it was liable to cease without his consent, if he who had been captive made his way to his own people. He therefore loses the property, as he loses the man to whom it was an accessary.

2 But what if he had alienated this property? Will he who derives his title from him who, at the time, was owner, by the right of war, be safe by the law of nations; or may the property be recovered

extra id genus sunt, quod discrimen jam mox explicabimus, ut illa videantur alienata cum sua causa et sub conditione: ista vero simpliciter. Alienata autem intelligo etiam quæ donata aut acceptilata sunt.

VII. At sicut ad postliminio redeuntem jura redeunt, ita et jura in ipsum restituuntur, ac pro eo habentur, ut Tryphoninus loquitur, ac si nunquam ille hostium potitus fuisset. *L. 12. § 6. l. 6. D. de capt.*

VIII. Huic regulæ de liberis hominibus exceptionem hanc recte asscribit Paulus: *postliminio carent qui armis victi hostibus se dederunt*, nimirum quia pactiones cum hostibus factæ valent jure gentium, ut alibi dicemus, nec adversus eas est postliminium. Ideo Romani illi a Pœnis capti apud Gellium: *postliminium justum non esse sibi, quoniam dejurio vincti forent.* Undo et induciarum tempore non esse postliminium recte a Paulo notatum est. At hos qui hostibus deduntur sine ulla scilicet pactione, postliminio reverti respondit Modestinus. *L. 17. d. tit.* Lib. vii. 18. *L. 19. § 1. D. de capt.* *L. 4. d. tit.*

IX. 1 Quod de singulis personis diximus, idem et in populis locum habere arbitror, ut qui liberi fuerunt suam

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from him? I speak of the property which he had in a neutral state. Here, it seems, we must make a distinction between things which are of such a nature that they return by postliminium, and things not of that nature: which difference we shall soon explain. The former class of things are, it would seem, alienated with their cause, the person, and under condition: the latter are simply alienated. By alienated, I mean given away, or acknowledged as received.

VII. And as the person who returns by postliminium recovers his rights, so also rights against him are restored, and are held the same as if he had never been in the power of the enemy, as Tryphoninus says.

VIII. To this rule concerning free men, Paulus rightly annexed this exception. Those who surrender themselves, lose postliminium, namely, because conventions made with an enemy are valid by the law of nations, and against these, postliminium does not hold. So the Romans captured by the Carthaginians, say, in Gellius, that they have no right to postliminium, since they were captives by right. Whence during a truce, there is no postliminium, as Paulus rightly notes; but those who are surrendered to the enemy without any compact, return by postliminium, as Modestinus gave his opinion.

IX. 1 What we have said of individuals, I conceive holds also for a people; so that they who have been free, recover their liberty, if it

recipiant libertatem, si forte eos vis sociorum eximat hostili imperio. At si ipsa multitudo quæ civitatem constituerat dissoluta sit, verius puto non eundem populum censeri, nec postliminio res restitui ipso gentium jure, quia populus, ut navis, partium dissolutione plane interit, eo quod tota ejus natura in illa perpetua conjunctione consistit. Non ergo quæ fuerat Sagunti civitas eadem exstitit, cum veteribus cultoribus ea sedes octavo post anno restituta est: neque Thebæ, cum jam Thebani in servitutem ab Alexandro veniissent. Hinc apparet quod Thessali Thebanis debuerant, non esse Thebanis postliminio restitutum: idque duplici de causa: tum quod novus erat populus, tum quod Alexander, quo tempore dominus erat, hoc jus alienare potuerat et alienaverat, et quia creditum non in eorum est numero quæ postliminio redeunt.

2 Ei quod de civitate diximus haud multum dissimile est quod veteri illo Romano jure, quo dissolubilia erant conjugia,
L. 8. l. 14. §1. D. de capt. [q] matrimonium non censebatur postliminio restitui, sed novo consensu redintegrari.

X. 1 Et ex his quidem intelligi potest quale sit jure gentium postliminium in liberis hominibus. Ceterum jure civili idipsum jus, quod ea attinet quæ intra civitatem agun-

[q] *Matrimonium non censebatur postliminio restitui*] Aliter inter Christianos. Leo Papa ad Nicetam Aquileiensem episcopum: *ut sicut in mancipiis vel agris, aut etiam in domibus ac possessionibus, in captivitatem ductis, postliminium reversis de captivitate servatur, ita etiam et conjugia, si aliis juncti fue-*

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happen that the force of their friends extricate them from the power of their enemies. But if the multitude which had constituted the state or city be dissolved, I conceive it to be more true that it is not to be reckoned the same people, and that their condition is not restored by postliminium, by the law of nations: for a people, like a ship, by the dissolution of its parts, perishes outright; since its whole nature consists in the continuity of its composition. And therefore that which had been the city of Saguntum was no longer the same city, when the same place was restored to the old inhabitants eight years later: nor was Thebes the same city when the Thebans had been sold as slaves by Alexander. Hence it appears that what the Thessalians owed the Thebans was not restored to the Thebans by postliminium, and that, for two reasons: because it was a new people; and because Alexander could and did alienate this right; and because a credit is not of the number of the things which return by postliminium.

2 What we have said of a city, is not dissimilar from the old Roman law, according to which, marriages being dissolvable, the mar-

tur, et adstringi additis exceptionibus aut conditionibus, et produci ad alia commoda potest. Sic jure civili Romano de numero eorum qui postliminio redeunt, exemti sunt transfugæ: *d. l. 19. § 4. et § 7. eod. tit.* etiam filiifamilias in quos patri videtur salva esse debuisse potestas illa patria, quæ propria erat Quiritium. Sed hoc ideo placuisse ait Paulus, quia disciplina castrorum antiquior fuit parentibus Romanis quam caritas liberorum: cui congruit quod de Manlio ait Cicero, suo dolore sancivisse eum militaris *De Finib. i. 7, 10.* imperii disciplinam, ut saluti prospiceret civium, qua intelligebat contineri suam: ipsique naturæ et patrio amori prælatum ab eo jus majestatis.

2 Detrahit et hoc aliquid de jure postliminii, quod legibus Atticis primum, deinde Romanis constitutum est, ut qui *Dem. in Nic. p. 724 B.* redemtus est ab hostibus, redemtori [r] serviat, donec pretium reddiderit. Sed hoc ipsum favore libertatis introductum apparet, ne ademta spe recuperandæ pecuniæ multi in hostium manu relinquerentur. Et illa ipsa servitus iisdem Romanis legibus multis modis mitigatur, et postrema lege Justiniani *L. ult. C. de postl.* finitur operis quinquennii: morte quoque redemti jus repe- *L. si patre, 15. D. de capt. et postl.* tendæ pecuniæ exstinguitur: sicut et contracto inter redimentem et redemtum matrimonio remissum censetur: et redemtæ *L. si is qui te, 13. C. de postl.*

rint, reformentur. Vide Hincmarum in opusculo de divortio Lotharii et Tetbergæ ad interrogationem XIII. et responsum Stephani Papæ cap. 19. in tomo II. conciliorum Galliæ.

[r] *Serviat donec pretium reddiderit*] Idem cap. 34. edicto Caroli Calvi Pistis.

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riage state was not considered to be restored by postliminium, but required to be renewed by a new agreement.

X. 1 Such is the Law of Nations, as to postliminium for free men: the Civil Law modifies and extends this. So deserters had not this privilege; nor sons under the Quirital *patria potestas:* for, as Paulus says, the discipline of the camp outweighed the love of children: as Cicero says of Manlius, that he preferred discipline and loyalty to paternal affection.

2 Again, there was this restriction of the privilege, by Attic and Roman laws, that he who was ransomed must serve his ransomer, till he had remunerated him. This however was to encourage the practice of ransoming. And this servitude was afterwards mitigated, and, by Justinian, reduced to five years: and extinguished by the death of the person ransomed; as also remitted by marriage contracted between the ransomed and the ransomer; and lost by the prostitution of a woman so redeemed; and other laws of Rome there were on this subject. [See the text.]

L. fœdiss. 7. *eod. tit.* mulieris prostitutione amittitur, multaque alia jure Romano in favorem redimentium et pœnam proximorum qui suos non redimunt constituta sunt.

3 Rursum auctum est postliminii jus lege civili, eo quod non ea tantum quæ in postliminio sunt jure gentium, sed res omnes, jura omnia perinde habentur ac si is qui rediit nunquam hostium potitus esset: quod et jure Attico obtinuit. Nam, ut apud Dionem Prusæensem oratione xv. legimus, qui-
Pag. 239 B, C. dam Calliæ se filium dicens captum in clade ad Acanthum, et serviisse in Thracia, cum Athenas postliminio rediisset, hereditatem Calliæ a possessoribus petiit, nec aliud quæsitum est
Pag. 242 D. in judicio quam an is revera Calliæ esset filius. Idem narrat, Messenios cum longo tempore serviissent, tandem et liberta-
L. ab hostibus. 18. *C. de postlim.* tem et regionem recepisse. Imo et quæ per usucapionem aut liberationem ex bonis subtracta, vel non utendo finita esse videbantur, actione rescissoria restituuntur: nam in edicto
L. 1. § 1. *D. quib. ex caus. maj.* de majoribus in integrum restituendis, is comprehenditur qui in hostium est potestate. Et hoc quidem venit ex jure Romano antiquo.

4 At lex Cornelia etiam heredibus consuluit eorum qui capti apud hostes decessissent: bona eorum conservans perinde quasi qui non redit jam eo tempore quo captus est decessisset. Quæ jura civilia si tollas, haud dubie statim ut

[s] *Bona ejus futura fuissent occupantium*] Vide *legem Wisigotthicam* Lib. v. tit. iv. c. 15.

[t] *Etiam sæpe alienati*] At edicto Theuderici ita constitutum est: *servi aut coloni ab hostibus capti et reversi domino restituantur, si non sunt ante ab altero vendentibus hostibus in commercio comparati.* (Cap. 148.) Vide et Cassiodorum III. 43. At *lege Wisigot-*

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3 Again, the privilege was extended by the Roman and Attic law, so that all rights were restored to the person. So a person, calling himself the son of Callias, who had been a slave in Thrace, having been taken in the defeat at Acanthus, returned to Athens, and claimed the inheritance of Callias from the possessors of it; and, in the trial, no enquiry was made, except whether he were the son of Callias. So the Messenians, after long servitude, recovered their liberty and their country. Even what had been lost by usucaption, or otherwise, might be recovered.

4 The Cornelian law provided for the heirs of those who died while in the enemies' hands. If this had not been so, any one might have seized their property, for they were reckoned as nullified; and if they returned, had no right, except to postliminium *jure gentium*.

quis ab hostibus captus esset [s] bona ejus futura fuissent occupantium, quia qui apud hostes est, pro nullo habetur. Quod si qui captus fuerat rediret, nihil reciperet præter ea quæ jure gentium postliminium habent. Quod vero captivorum bona fisco cedunt si heres nullus sit, ex jure speciali est Romano. Vidimus de his qui redeunt: videamus de his quæ recipiuntur. *L. 31. D. de jure fisci. l. 22. § 1. D. de capt.*

XI. 1 Inter hæc sunt primum servi et ancillæ, [t] etiam sæpe alienati, [u] etiam ab hoste manumissi: quia hostium jure manumissio obesse civi nostro servi domino non potuit: ut bene notat Tryphoninus. Sed ut servus recipiatur, necesse est ut aut revera habeatur a vetere domino, aut haberi facile possit. Quare cum in rebus aliis sufficiat eas intra fines esse perductas, ad postliminii jus in servo id non erit satis, nisi et cognoscatur: nam qui in urbe Roma est ita ut lateat, nondum receptus Paulo videtur. Ac sicut hac in parte a rebus inanimis distat servus, ita vicissim a libero homine in eo distat, quod ut postliminio recipiatur non requiritur ut animo res nostras sequendi venerit. Id enim in eo requiritur qui se recepturus est, non in eo qui ab altero sit recipiendus, et ut Sabinus scripsit, *de sua qua civitate cuique constituendi facultas libera est, non de dominii jure.* *L. in bello, 12. § manumittendo, 9. D. De capt.* *L. ult. D. de capt.* *d. l. 12. § 9. eod.*

2 Non excepit ab hoc gentium jure servos transfugas lex

thica mancipium bello receptum domino redditur, is qui recepit, tertiam partem accipit justi pretii. Si ab hostibus venditum receptum fuerit, redit ad dominum pretio reddito et meliorationis. Lib. v. tit. iv. 21.

[u] *Etiam ab hoste manumissi*] Ut a Mithridate, qui retracti in servitutem. Appianus Mithridatico, (pag. 211. *Ed. H. Steph.*)

The confiscation of the property of captives, if there is no heir, is a special Roman law.

So much of those persons who return: now of the things which are recovered.

XI. 1 Such are men and women slaves, even when repeatedly alienated, or manumitted by the enemy: for such manumission cannot prejudice the right of the citizen owner. But that a slave be recovered, he must be in a condition to be got at by his master; not only returned within the empire, but known of; it is not enough if he be hidden in Rome. And as a slave in this differs from inanimate things, in another point he differs from a free man; it is not necessary he should have come with a view of staying with us.

2 Runaway slaves are not excepted from this rule. The owner

Romana. Nam et in his dominus pristinum jus recipit, ut
d. l. 19. § 5. cod. Paulus nos docet: ne contrarium jus non tam ipsi injuriosum sit qui servus semper permanet, quam domino damnosum. Generaliter de servis qui virtute militum recuperantur, dictum
L. 12. C. de postl. est ab Imperatoribus illud quod ad res omnes male a nonnullis trahitur, *receptos eos non captos judicare debemus, et militem nostrum defensorem eorum decet esse, non dominum.*

3 Qui ab hostibus redemti sunt servi protinus Romano jure fiunt redimentis, sed oblato demum pretio postliminio recipi intelliguntur. Verum hæc subtilius explicare juris civilis interpretum est. Nam et posterioribus legibus mutata sunt nonnulla: et quo servi capti ad reditum invitarentur, proposita libertas his quibus membrum ruptum esset statim, ceteris post quinquennium, ut videre est in legibus militaribus a Rufo collectis.

XII. Illa quæstio magis ad nos pertinet, an et populi qui subjecti alieno imperio fuerunt in veterem causam recidant: quod tractari potest si non is cujus imperium fuerat, sed sociorum aliquis eos hosti eripuisset: puto hic idem dicendum quod in servis, nisi sociali fœdere aliter convenerit.

XIII. 1 Inter res primum occurrunt agri, qui in postli-

[x] *Veteribus dominis*] Nempe qui partium Lacedæmoniarum fuerant. Confer quæ supra cap. vi. § 7.

[y] *Non admissis adversus dominos præscriptionibus illis*] Idque ex lege Honorii, qui quanquam relicta Vandalis Hispania, tamen dum eam tenerent Vandali, præscriptionem tricenariam dominis nocere noluerat: meminit Procopius *Vandalicorum* I. (cap. 3.) Valentinianus in novella lege de episcopali judicio: *tricennali temporum definitione concludi ea præcepimus, quæ perpetuis aut infinitis sæculis servabantur: excep-*

recovers his former right to them. To punish them, would injure the master rather than the slave. The rule with regard to slaves recovered by the army, is that *they are recovered, not captured: the soldier is their defender, not their owner.*

3 Slaves ransomed from the enemy, become the property of the ransomer, or may be recovered by postliminium, on paying the price. But the details of this belong to the juristical commentators: and were afterwards changed.

XII. Another question belongs more to us; whether a people, who have been subjected to a foreign authority, return to their ancient condition: which may be treated, if not he to whose government they had belonged, but some of his allies, have delivered them from the enemy. I conceive we must here decide as we do concerning slaves, except there be some other convention in the alliance.

minio sunt. *Verum est*, ait Pomponius, *expulsis hostibus ex agris quos ceperint dominia eorum ad priores dominos redire.* Expulsi autem hostes intelligi debent, ex quo aperte eo accedere amplius non possunt, ut alibi explicavimus. Sic Æginam insulam Atheniensibus ereptam [x] veteribus dominis Lacedæmonii reddiderunt. Agros ex Gothis et Vandalis recuperatos veterum possessorum heredibus reddiderunt Justinianus, aliique Imperatores, [y] non admissis adversus dominos præscriptionibus illis, quas Romanæ leges induxerant.

L. si capt. 20. § *verum est* 1. *D. de capt.*

Strabo viii. p. 376.

Nov. xxxvi.

Nov. Valent. de episc. Jud. Proc. 1. *de bell. Vand.* Cuj. *obs.* x. 12.

2 Quod de agris jus est, idem esse arbitror de omni jure quod solo adhæret. Nam et loca capta ab hostibus quæ religiosa vel sacra fuerant, si ab hac calamitate fuerint liberata, quasi quodam postliminio reversa pristino statui restitui scripsit Pomponius: quicum convenit illud Ciceronis in Verrina de signis, de Diana Segestana: *P. Africani virtute religionem simul cum loco recuperavit:* et Marcianus cum postliminii jure comparat jus illud quo solum ædificio occupatum eo collapso littori redditur. Quare et usumfructum agri recepti restitui dicendum erit, ad exemplum ejus quod de agro inundato Pomponius respondit. Sic Hispanis lege cautum est, ut comitatus et alia jurisdictiones hereditariæ postliminio redeant,

L. cum loc. 36. *D. de religiosis* Lib. iv. 35.

L. in tantum. 6. *de divis. rer.*

L. si ager. 26. *D. quibus mod. usus-fruct. amit.* *Reg. Cons.* x. *tit.* 29. p. 2.

tis Afrorum negotiis, qui se probaverint necessitatem Vandalicam pertulisse: ut de illorum causis illa tempora præfixo tricennio subtrahantur, quæ claruerit sub hostilitate consumta. In concilio Hispalensi relato in causam xvi. quæstione iii. c. 13. *sicut per legem mundialem his quos barbarica severitas captiva necessitate transvexit, postliminio revertentibus redditur antiqua possessio:* convenit c. ex transmissa: *de præscriptionibus:* vide et Cujacium ad titulum C. de præscriptione xxx. annorum.

XIII. 1 Among things, land first occurs. This is recovered by postliminium, when the enemy are expelled: that is, when the enemy can no longer openly approach the land. So the Lacedæmonians, when they had taken Egina from the Athenians, restored it to its ancient owners. Justinian gave the lands taken from the Goths and Vandals to the heirs of the old possessors, not admitting contrary prescriptions.

2 What is true of lands, is true of all rights adhering to the soil. So places which had been consecrated as religious, if liberated, resume their former state: as Cicero argues against Verres, of the Diana of Segeste. Marcion compares the right of postliminium to that by which, when a house tumbles down, the soil is restored to the shore. And therefore the usufruct of recovered land is to be restored: as was ruled, if it had been inundated. So the Spanish law directs that

majores omnino; minores, si intra quadriennium a receptione vindicentur; nisi quod arcem bello amissam et quomodocunque recuperatam retinendi jus rex habet.

XIV. 1 De mobilibus generalis in contrarium regula est, ut postliminio non redeant, sed in præda sint: ut hæc opponit Labeo. Quare et commercio parata, ubicunque reperiuntur, manent ejus, qui emit: nec apud pacatos reperta aut intra fines perducta vindicandi jus est veteri domino. Sed ab hac regula videmus olim excepta, quæ in bello usum habent: quod ideo placuisse gentibus videtur, ut recuperandi spes ad ea comparanda alacriores homines redderet. Plurimarum enim civitatum instituta eo tempore ad rem bellicam referebantur: quare facile in hoc consensum est. Usum autem in bello hæc habere censentur quæ modo ex Gallo Ælio attulimus, sed quæ distinctius exposita exstant tum apud Ciceronem in Topicis, tum apud Modestinum. Naves scilicet longæ atque onerariæ, non item lusoriæ aut actuariæ, voluptatis causa paratæ: muli, sed clitellarii: equi et equæ, sed freni patientes. Et hæ res sunt, quas et legari recte voluerunt Romani, et in præstationes familiæ herciscundæ venire.

Cap. 8.
L. 2. et 4. D. de capt.

L. id quod apud host. 3. D. de leg. 1. L. item Lab. 22. cum l. seq. D. fam. herc.

2 Arma et vestis usum quidem in bello habent, sed postliminio non redibant, quia minime favorabiles erant, qui in bello arma aut vestem amitterent: imo id flagitii loco habebatur, ut passim in historiis apparet. Atque in hoc notantur arma ab equo distare, quod equus sine culpa equitis proripere

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counties, and hereditary jurisdictions, are restored by postliminium; the major ones, absolutely; the minor, if they are claimed within five years from their recovery; except that a fort, lost and regained, the king has the right of retaining.

XIV. 1 Concerning moveables, on the other hand, the contrary rule in general holds: that they do not return by postliminium, but become prize. Hence objects of traffic, wherever bought, become the property of him who buys them: and if found among neutrals, or brought home, cannot be claimed by the old owner. But from this rule, were excepted formerly munitions of war; the reason being, apparently, that men might be more active in recovering these. For many states have their laws made especially with a view to war. We have already stated what are munitions of war. [See also Cicero, &c.]

2 Arms and clothing have their use in war, but had not the privilege of postliminium; because they who lost them were little favoured, indeed were disgraced. And so a horse is different in this respect from arms; for the horse may be lost without fault of the rider.

se potuit. Et hoc quidem rerum mobilium discrimen videtur usum habuisse in occidente, etiam sub Gothis, ad Boëthii usque tempora. Is enim Ciceronis topica explicans ita videtur de hoc jure loqui, quasi quod ad eum diem vim suam obtineret.

XV. At posterioribus temporibus, si non ante, sublata videtur hæc differentia. Passim enim tradunt morum periti res mobiles postliminio non redire, et [z] id de navibus constitutum multis in locis videmus. Bart. *in l. si quid bello D. de capt.* Ang. et Salic. *in l. ab host. C. de capt.* *Const. Gall.* l. xx. *tit.* 13. *art.* 24. et *Consul. mar.* c. 287.

XVI. Eæ vero res, quæ intra præsidia perductæ nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum mutarunt ex gentium jure. Et quæ piratæ aut latrones nobis eripuerunt, non opus habent postliminio, ut Ulpianus et Javolenus responderunt: quia jus gentium illis non concessit, ut jus domini mutare possint: quo innixi Athenienses Halonesum, quam ipsis prædones, [a] prædonibus Philippus eripuerat, ut redditam a Philippo, non ut donatam, volebant accipere. Itaque res ab illis captæ, ubicunque reperiuntur, vindicari possunt, nisi quod ex naturali jure alibi censuimus, ei qui suo sumtu possessionem rei adeptus est, tantum esse reddendum, quantum dominus ipse ad rem recuperandam libenter impensurus fuerat. *L. hostes*, et 24. et *l. latr.* 27. *D. de capt.* Vid. et *L. postlim.* 19. § *a piratis.* 2. *cod. tit.* Demosth. *de Haloneso.* p. 30 A. *Sup.* ii. 10. § 9.

[z] *Id de navibus constitutum multis in locis videmus*] *Decisio Genuensis* centesima prima.

[a] *Prædonibus Philippus eripuerat*] Vide ipsam Philippi epistolam inter opera Demosthenis, (pag. 63 A, B.)

Boethius seems to imply that the distinction held up to his time, under the Goths.

XV. But at a later period, if not sooner, this distinction was abolished; for those who speak of customs, always say that moveables have not postliminium; and we see this, in many places, practised as to ships.

XVI. Things which are not yet brought *intra præsidia*, though seized by the enemy, do not need postliminium, because they have not changed their master *jure gentium*. So, what things pirates and robbers take from us, do not need postliminium; for such persons, *jure gentium*, cannot change the ownership. And on this ground, when pirates had taken Halonesus from the Athenians, and Philip had taken it from pirates, the Athenians wished him not to give, but to restore it to them. Things taken by such persons may be claimed wherever they are found: except, as elsewhere said, that by natural law, we must pay the possessor who has acquired them at his own expense, as much as the owner would pay to recover them.

XVII. Potest tamen lege civili aliud constitui: sicuti [b]lege Hispanica naves a piratis captæ eorum fiunt, qui eas eripiunt piratis: neque enim iniquum est, ut privata res publicæ utilitati cedat, præsertim in tanta recuperandi difficultate. Sed lex talis non obstabit exteris, quo minus res suas vindicent.

Lib. xxxi. *tit.* 29. p. 2. Covar. *ad c. peccat.* part. 2. § 11. n. 8.

XVIII. 1 Illud magis mirandum, quod testantur Romanæ leges, postliminii jus locum habuisse non tantum inter hostes, sed et inter Romanos et populos externos. Sed alibi diximus, reliquias has esse sæculi Nomadum, quo sensum naturalis societatis, quæ est inter homines, mores exsurdaverant. Itaque apud gentes etiam, quæ bellum publicum non gererent, erat quædam belli inter privatos quasi ipsis moribus indicti licentia: ac, ne ea licentia ad interficiendos homines prosiliret, placuit captivitatis jura inter eos introduci, cui consequens fuit, ut et postliminio locus esset, aliter quam cum latronibus ac piratis, quia illa vis rem producebat ad æquas pactiones, quæ a latronibus et piratis contemni solent.

Lib. ii. 15. § 5.

2 Juris olim controversi videtur fuisse, an, qui apud nos

[b] *Lege Hispanica naves a piratis captæ eorum fiunt, qui eas eripiunt piratis*] Idem apud Venetos. Patet ex literis Fraxinii Canæi tomo I.

XVII. But other rules than this may be established by Civil Law: as by the Spanish law, ships become theirs who regain them from pirates; nor it is not unreasonable that private interests should yield to public utility; especially, the difficulty of recovery being so great. But such a law does not prevent strangers from trying to recover what is theirs.

XVIII. 1 It is more remarkable, that, as the Roman Laws testify, the right of postliminium had place, not only between enemies, but between the Romans and foreign nations. But, as we have elsewhere said, these traits were relicks of the nomade age of mankind, in which barbarous manners had blunted the natural sense of the natural society which ought to bind men to men. And thus, even between nations which had not a public war between them, there was a kind of licence of private undeclared war: and in order that this licence might not go to the length of putting strangers to death, there was introduced a right of making prisoners between nations; from which it followed, that there was also occasion for postliminium, in a different way than with robbers and pirates; because that force, used in such cases, led to fair compacts; which are commonly held in no regard by robbers and pirates.

serviunt ex populo federato, si domum revenissent, postliminio redeant. Ita enim hanc quæstionem proponit Cicero primo de oratore. Et Gallus quidem Ælius sic ait: *cum populis liberis et cum federatis, et cum regibus postliminium nobis est ita uti cum hostibus.* Contra Proculus: *non dubito quin federati et liberi nobis externi sint: non inter nos atque eos postliminium esse.*

Apud Fest. voce Postl.

L. non dubit. 7. princ. D. de captiv. et postl.

3 Ego arbitror distinguendum inter federa, ut si qua essent quæ belli duntaxat publici componendi aut cavendi causa essent inita, ea nec captivitati in posterum, nec postliminio obstarent: at si qua id continerent ut tuti essent publico nomine, qui ab his ad illos venissent, ut tunc captivitate sublata cessaret et postliminium. Et hoc mihi indicare videtur Pomponius, cum ait: *si cum gente aliqua neque amicitiam, neque hospitium, neque fedus amicitiæ causa factum habemus, hi hostes quidem non sunt: quod autem ex nostro ad eos pervenit, illorum fit, et liber homo noster ab eis captus servus fit et eorum: idemque est si ab illis ad nos aliquid perveniat: hoc quoque igitur casu postliminium datum est.* Cum dixit fedus amicitiæ causa, ostendit et alia esse posse federa, quibus nec hospitii nec amicitiæ jus insit. Proculus quoque eos a se populos federatos intelligi, qui amicitiam aut

D. l. postl. § in pace 2.

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2 It appears formerly to have been a matter of controversy whether those members of a people, allied to us, who are slaves in our country, do, if they return home, return by postliminium. For so Cicero proposes this question; and Gallus Ælius says, that with free and with allied people, and with kings, we have postliminium, as with enemies. On the other hand, Proculus says, that *federate peoples are externi, and that there is not postliminium with them.*

3 I conceive that a distinction must be taken between different leagues of alliance. If these were entered into merely for the purpose of settling or preventing a public war, these would not prevent either captivity or postliminium: but if the leagues contained a provision that those who came from one party to the other should be safe on the public security, then, captivity being removed, postliminium would cease also. So Pomponius: *If we have, with any nation, neither friendship, hospitality, nor league of friendship, these are not enemies; but if anything of ours goes to them it becomes theirs; and a free man of ours, made captive there, is their slave; and so from them to us. In this case, then, postliminium exists.* By saying "a league of friendship," he shews that there may be other leagues, which do not give the right of hospitality or friendship. So Proculus sufficiently implies that he

hospitium tutum promisissent, satis significat cum subjicit: *etenim quid inter nos atque eos postliminii opus est, cum et illi apud nos, et libertatem suam et dominium rerum suarum æque atque apud se retineant, et eadem nobis apud eos contingant?* quare quod apud Gallum Ælium sequitur, *quæ nationes in ditione nostra sunt, cum his postliminium non est,* ut recte legit Cujacius, hoc additamento supplendum erit, nec cum his quibuscum fedus amicitiæ causa habemus.

Obs. xi. 23.

XIX. 1 At nostris temporibus non inter Christianos tantum, sed et apud plerosque Mahumetistas, jus ut captivitatis extra bellum, ita et postliminii evanuit, sublata utriusque necessitate ob restitutam vim ejus cognationis, quam inter homines natura esse voluit.

Bod. i. *de rep.* c. 7.

2 Habere tamen locum poterit vetus illud jus gentium, si res sit cum gente tam barbara, ut sine indictione aut causa omnes externos et res eorum hostiliter tractare pro jure habeat. Atque eam in partem, dum hæc scribo, judicatum est in summo auditorio Parisiensi, cœtus principe Nicolao Verdunio: bona, quæ Francorum civium fuerant, ab Algeriensibus, populo prædationibus maritimis in omnes alios grassari solito,

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means, by "federate peoples," those who have promised friendship or safe hospitality, by saying, *For what need is there of postliminium in such a case; since they retain their liberty and ownership in our territory equally as in their own; and we in theirs?* Wherefore what follows in Gallus Ælius: *With the nations which are under our authority, there is no postliminium,* is to be understood with the addition, nor with those with whom we have a league of friendship.

XIX. 1 In our own time, not only among Christians, but also among most Mahometan nations, the right, both of making prisoners out of war-time, and the right of postliminium, have vanished; the necessity of both having disappeared, by the restoration of that relationship which nature intended to exist among men.

2 But that ancient Law of Nations may have place, if we have to do with a nation so barbarous, that it is accustomed, without cause or declaration, to treat all foreigners and their property in a hostile manner.

And at the very time that I am writing, a judgment to this effect is given in the High Court of Paris, under the presidency of Nicolas Verdun: that goods which had belonged to French citizens, and had been taken by the Algerines, who are accustomed to send sea-rovers, and to attack all nations, had changed their owner by the right of war:

capta belli jure mutasse dominum: ac proinde, cum recepta ab aliis essent, facta eorum, qui recepissent. In eadem cognitione et hoc judicatum est, quod modo diximus, naves hodie inter ea non esse, quæ postliminio recipiuntur.

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and consequently, being recovered by others, became the property of those who had recovered them. And in the same cause, this also was adjudged, that ships are not, at the present day, in the number of the things which are recovered by postliminium.

CAPUT X.

MONITA DE HIS, QUÆ FIUNT IN BELLO INJUSTO.

I. *Quo sensu pudor vetare dicatur, quod lex permittit:*
II. *Aptatum hoc ad ea quæ jure gentium permissa diximus.*
III. *Interna injustitia injustum esse, quod ex bello injusto fit.*
IV. *Qui hinc, et quatenus ad restitutionem obligentur.*
V. *An res captæ bello injusto reddendæ sint ab eo, qui cepit.*
VI. *An et ab eo, qui detinet.*

I. 1 LEGENDA mihi retro vestigia, et eripienda bellum gerentibus pene omnia, quæ largitus videri possum, Lib. iii. 4. nec tamen largitus sum: nam, cum primum hanc juris gentium partem explicare sum aggressus, testatus sum, *juris esse* aut *licere* multa dici, eo quod impune fiant, partim etiam quod judicia coactiva suam illis auctoritatem accommodent, quæ tamen aut exorbitent a recti regula, sive illa in jure stricte dicto, sive in aliarum virtutum præcepto posita est, aut certe omittantur sanctius et cum majori apud bonos laude.

2 In Troadibus Senecæ dicenti Pyrrho (vers. 333):

> Lex nulla capto parcit, aut pœnam impedit:

regerit Agamemnon,

> Quod non vetat lex, hoc vetat fieri pudor.

Quo in loco pudor non tam hominum et famæ, quam æqui et boni, aut certe ejus quod æquius meliusque est, respectum De Fideicom. hered. § 1. significat. Sic in Justinianeis *Institutionibus* legimus: *fideicommissa appellata sunt, quia nullo vinculo juris, sed tan-*

CHAPTER X. *Warnings concerning things done in an unjust War.*

I. 1 I must now tread back my steps, and take from belligerents nearly all, which I have seemed to grant them; and yet have not really granted; for when I began to explain this part of the Law of Nations, I testified that many things were said to be *law*, or *lawful*, because they are done with impunity; partly also, because coactive judgments of tribunals accommodate their authority to them: while the things themselves either deviate from the rule of right, (whether that rule be regulated by strict justice, or by the precepts of other virtues,) or at least, may more righteously and laudably be omitted.

2 We have often *pudor*, *shame*, referred to as moderating strict rights: *pudor* meaning, not so much a regard to reputation and men's

tum pudore eorum, qui rogabantur, continebantur. Apud patrem Quintilianum: *non aliter salvo pudore ad sponsorem venit creditor, quam si recipere a debitore non possit.* Atque eo sensu sæpe videas justitiam cum pudore conjungi. Declam. 273.

Nondum justitiam facinus mortale fugarat:
  Ultima de superis illa reliquit humum,
Proque metu populum sine vi pudor ipse regebat.

Ovid. *Fast.* i. 248, *et seqq.*

Hesiodus: *Oper.* v. 192, 193.

Δίκη δ' ἐν χερσὶ καὶ αἰδὼς
Οὐκ ἔσται, βλάψει δ' ὁ κακὸς τὸν ἀρείονα φῶτα.

Nusquam pudor: aurea nusquam
Justitia: insultant pravi melioribus ultro.

Plato libro XII. *de Legibus:* παρθένος γὰρ αἰδοῦς δίκη λέγεταί τε καὶ ὄντως εἴρηται emendem πάρεδρος· ut sensus sit: *comes pudoris justitia vocatur, et merito quidem.* Nam et alibi idem Plato sic loquitur: Θεὸς δείσας περὶ τῷ γένει ἀνθρώπων, μὴ ἀπόλοιτο πᾶν, δωρᾶται ἀνθρώποις αἰδῶ τε καὶ δίκην, ἵν' εἶεν πόλεων κόσμοι τε καὶ δεσμοὶ φιλίας συναγωγοί· *Deus metuens, ne plane interiret genus humanum, dedit hominibus justitiam ac pudorem, ornamenta civitatum, et ad amicitiam colligandam vincula:* et Plutarchus simili modo δίκην vocat ἔνοικον αἰδοῦς, *justitiam pudoris cohabitatricem,* qui et alibi jungit αἰδῶ et δικαιοσύνην. Apud Dionysium Halicarnassensem simul nominantur αἰδὼς, κόσμος καὶ δίκη, *pudor, decorum, et honestum.* Sic et αἰδῶ et ἐπιείκειαν copulat Josephus *pudorem et æquitatum.* Paulus quoque jurisconsultus conjungit naturale jus et pudorem. Cicero autem inter justitiam et verecundiam ita fines regit,

Pag 943 E. Tom. II.
Protag. p. 322 C. Tom. I.
Ad inerudit. Princip. p. 781 B. Tom. II.
Vit. Thes. p. 3 c. Tom. I.
Lib. vi. 36.
Lib. xiii. *Antiq.* c. 19. (c. 11. § 3. *div. Huds.*)
L. 14. § 2. *D. de ritu nupt.*
Offic. i. 28.

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opinion, as a regard to what is equitable and good, or at least, more equitable and better. So Seneca. So in Justinian's *Institutes,* Trusts (*fidei commissa*) are said to have for their bond the *pudor* of the Trustees. So Quintilian says the creditor cannot go to the surety, *salvo pudore,* except the debtor fails him. And in this sense *pudor* is often conjoined with justice, as in Ovid. So Hesiod conjoins *δίκη* and *αἰδώς*. And Plato says that *αἰδώς* is the assessor of *δίκη*. And in the Protagoras, he says that the two, *δίκη* and *αἰδώς*, a feeling of justice and of mutual reverence, were given to man to hold society together. So Plutarch also, and Dionysius of Halicarnassus. So Josephus, and Paulus the Jurist. Cicero arranges the offices of justice, and *verecundia,* so that the former prevents us wronging men, the latter, offending them.

ut justitiæ partes statuat non violare homines, [1]verecundiæ non offendere.

Lib. i. *de Ira*, c. 27.

3 Cum eo quem ex Seneca adduximus versu bene convenit dictum ejusdem in scriptis philosophicis: [a] *Quam angusta innocentia est ad legem bonum esse? quanto latius officiorum patet quam juris regula? quam multa pietas, humanitas, liberalitas, justitia, fides exigunt? quæ omnia extra publicas tabulas sunt.* Ubi vides jus a justitia distingui, quia jus accipit id, quod in judiciis externis viget. Idem id alibi explicat egregie exemplo juris herilis in servos: *In mancipio cogitandum est, non quantum illud impune pati possit; sed quantum tibi permittat æqui bonique natura, quæ parcere etiam captivis et pretio paratis jubet.* Deinde: *cum in servum omnia liceant, est aliquid quod in hominem licere commune jus animantium vetet:* quo in loco notanda iterum vocis *licere* diversa acceptio, altera exterior, altera interior.

Lib. i. *de Clem.* c. 18.

Liv. xxvi. 31.

II. 1 Eundem habet sensum illa Marcelli in senatu Romano distinctio: *non quid ego fecerim in disquisitionem venit, quem quicquid in hostibus feci jus belli defendit, sed quid isti pati debuerint:* ex æquo et bono scilicet. Idem discrimen Aristoteles innuit, disputans, an justa dicenda sit quæ ex bello oritur servitus: ὅλως δ' ἀντεχόμενοί τινες, ὡς οἴονται, δικαίου τινός· (ὁ γὰρ νόμος δίκαιόν τι) τὴν κατὰ

Pol. i. 6.

[1] At vero Verecundia heic est virtus quædam singularis: ut et Pudor in verbis Pauli Jurisconsulti proprie sumitur. *J. B.*

[a] *Quam angusta innocentia est ad legem bonum esse?*] Idem Seneca *de Beneficiis* v. 21. *Multa legem non habent, nec actionem, ad quæ consuetudo vitæ humanæ lege omni valentior dat aditum.* Quintilianus *Institutionum Oratoriarum* Lib. III. c. 6. *Sunt enim quædam non laudabilia natura, sed lege concessa, ut in* XII. *tabulis, debitoris corpus inter creditores dividi licuit, quam legem mos publicus repudiavit.* Cicero *de Officiis* libro III. *Aliter leges, aliter philosophi tollunt astutias: leges, quatenus manu tenere possunt: philosophi, quatenus ratione et intelligentia.* (Cap. 17.)

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3 So Seneca says: *How much wider is duty than law!* and the like. Justice is distinguished from *jus*, law; for *jus* is what holds in external judgments. And elsewhere, he explains this by the example of a master's right over his servants. *We are not to consider what you may do, but what is required by justice and fairness, which require us to spare even captives and slaves.* And again: *Though everything is lawful towards a slave, there are things which common humanity declares not to be lawful.* Whence note the two different uses of *lawful*, referring to external and to internal justice.

πόλεμον δουλείαν τιθέασι δικαίαν. ὅλως δ' οὔ φασι· τὴν γὰρ ἀρχὴν ἐνδέχεται μὴ δικαίαν εἶναι τῶν πολέμων· quidam respicientes justi aliquid ([b]*nam et lex justum quid est*) *justam esse aiunt servitutem ex bello; at omnino justam esse negant, quando accidere potest, ut injusta fuerit bellandi causa.* Simile est illud Thucydidis in Thebanorum Lib. iii. 66. oratione: *οὓς ἐν χερσὶν ἀπεκτείνατε, οὐχ ὁμοίως ἀλγοῦμεν· κατὰ νόμον γὰρ δή τινα ἔπασχον· de his, quos in conflictu occidistis, non adeo querimur: accidit enim hoc illis jure quodammodo.*

2 Sic et ipsi jurisconsulti Romani, quod sæpe jus captivitatis vocant, alibi injuriam appellant, et æquitati opponunt *L.* 19. *pr. D. de capt.* naturali; et Seneca servi nomen ex injuria natum, id quod *Ep.* xxxi. sæpe accidit respiciens. Apud Livium quoque Itali retinen- Lib. xxix. 1. tes ea, quæ Syracusanis bello ademerant, pertinaces ad obtinendam injuriam appellantur. Dion Prusæensis cum dixisset, *Orat.* xv. p. 240 A. bello captos, si ad suos rediissent, libertatem recipere, addit, *ὡς ἀδίκως δουλεύοντας, ut qui per injuriam in servitute fuissent.*

[c]Lactantius de philosophis loquens: *cum de officiis ad* *Inst. Div.* vi. 6. *rem militarem pertinentibus disputant, neque ad justitiam, neque ad veram virtutem accommodatur illa omnis oratio, sed ad hanc vitam moremque civilem.* Idem mox a Romanis ait legitime illatas injurias.

[b] *Nam et lex justum quid est*] Seneca *ad Helviam* c. 6. *alii armis sibi jus in aliena terra fecerunt.* Pugnare videntur *jus* et *aliena.* Sed concilianda, ut docet hic textus. Repete quæ supra hoc libro cap. iv. § 2.

[c] *Lactantius*] Augustinus vero epistola v. quæ est ad Marcellinum: (Ep. 138. § 14. *Edit. Benedictin.*) *ac per hoc si terrena ista respublica Christiana præcepta custodiat, etiam ipsa bella sine benevolentia non gerentur.* Idem de diversis ecclesiæ observationibus: *apud veros Dei cultores etiam ipsa bella pacata sunt.* [Ultimum locum habet Auctor a Gratiano, Caus. xxiii. Quæst. i. c. 6. neque enim alibi reperitur, quod sciam. *J. B.*]

II. 1 The same distinction is made by Marcellus speaking to the Senate: by Aristotle, when he says that slavery, though lawful, may be unjust: by the Thebans in Thucydides.

2 So the Roman jurists, though they speak of the right of captivity, also call this right a wrong, *injuria.* So Seneca. So Livy says the Italians were obstinate in injury, because they retained what they had in war taken from the Syracusans. So Dio Prusæensis speaks of captives taken in war, as unjustly enslaved. So Lactantius says that philosophers, discussing the rights of war, do not regard justice and

III. Primum ergo dicimus, si belli causa injusta sit, etiamsi bellum solenni modo susceptum sit, injustos esse interna injustitia omnes actus qui inde nascuntur: ita ut qui scientes tales actus operantur, aut ad eos cooperantur, habendi sint (1 *Cor.* vi. 10.) in eorum numero, qui ad regnum cœleste sine pœnitentia pervenire non possunt. Vera autem pœnitentia, si tempus et copia suppetat, omnino requirit, [d]ut is, qui damnum dedit, sive interficiendo, sive res corrumpendo, sive prædas agendo, id ipsum resarciat. Ideo Deus [e]negat grata sibi esse jejunia (*Jon.* iii. 8.) eorum qui non jure captos detinebant: et Ninivitis rex indicens justitium præcipit, ut rapina manus vacuefaciant, naturæ ductu agnoscens, sine tali restitutione pœnitentiam fictam et (*Lib. præcept. leg. præcept. jub.* 16.) inanem fore. Atque ita videmus sentire [f]non Judæos tantum et Christianos, sed et [g]Mahumetistas.

(Silv. *in verb. bell.* p. 1. n. 10, 11, et 12. Covar. *d.* § 11. n. 8. et Less. ii. 13. *dub.* 4. Adde *l.* 21. § 9. *D. de furtis.*)

IV. Ad restitutionem autem tenentur, secundum ea quæ generaliter a nobis alibi explicata sunt, belli auctores, sive potestatis jure, sive consilio, de his scilicet omnibus, quæ bellum consequi solent: etiam de insolitis, si quid tale jusserunt aut suaserunt, aut cum impedire possent non impedierunt.

d *Ut is, qui damnum dedit, sive interficiendo, sive res corrumpendo, sive prædas agendo, id ipsum resarciat*] Num. v. 6, 7. Hieronymus *ad Rusticum: nec differtur ultionis sententia, si non reddantur universa.* [Nil ibi tale apud Hieronym.] Augustinus in epistola *ad Macedonium*, quæ est LIV. (Ep. 153. § 20. *Edit. Benedictin.*) *Si res aliena, propter quam peccatum est, reddi possit, et non redditur, pœnitentia non agitur, sed simulatur.* Retulit Gratianus in causam XIV. quæstione vi. c. 1.

e *Negat grata sibi esse jejunia eorum, qui non jure captos detinebant*] Locus est illustris Esaiæ lviii. 5, 6, 7.

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virtue, but the customs of states: and he speaks of the legitimate wrongs inflicted by the Romans.

III. First, then, we say, that if the cause of war be unjust, though the war be regular in manner, all acts thence arising are unjust, according to internal injustice. And all who operate knowingly in such acts, or co-operate, are in the number of those who cannot enter into the kingdom of heaven without repentance for their acts. Now repentance, if time and opportunity be granted, requires restitution. And therefore, God declares that the fastings of those who (Isaiah lviii. 6) do not unloose unjust bonds are not grateful to him. And (Jonah iii. 8) the king of Nineveh proclaimed a fast, that the people might cease from violence: acknowledging, by a natural impulse, that repentance was idle without such amendment. And such we find the judgment, not only of Christians and Jews, but of Mahomedans.

IV. The restitution is due, from the authors of the war, for all evils inflicted: and for anything unusual which they have done, or not

Sic et duces tenentur de his, quæ suo ductu facta sunt: et milites in solidum omnes, qui ad actum aliquem communem, puta urbis incendium, concurrerunt: in actibus dividuis pro damno quisque cujus ipse causa unica, aut certe inter causas fuit.

V. 1 Neque admittendam putem exceptionem, quam nonnulli adferunt de his, qui aliis operam navant, si modo in ipsis aliquid hæreat [2]culpæ: ad restitutionem enim sine dolo culpa sufficit. Sunt, qui videntur existimare res bello captas, etiamsi justa belli causa non adfuerit, reddendas non esse, eo quod bellantes inter se, cum bellum inierunt, ista capientibus donasse intelligantur. Sed nemo suum jactare temere præsumitur: et bellum per se longe abest a contractuum natura. Ut vero pacati populi certi quid haberent quod sequerentur, nec bello implicarentur inviti, sufficiebat introductio externi, de quo diximus, dominii, quod cum interna obligatione restitutionis potest consistere. Atque id illi ipsi auctores videntur statuere in jure captivitatis personarum. Ideo Samnites apud Livium, *res hostium in præda captas, quæ belli jure nostræ*

Silv. *d. loco num.* 10. Vasq. Lib. i. *controv. ill.* c. 9. n. 17. Molin. *disp.* § *ut vero.* Lib. ix. 1.

habes eum græce apud Justinum Martyrem *in colloquio cum Tryphone.* (pag. 233. *Ed. Sylburg.*)

[f] *Non Judæos tantum*] Vide canones pœnitentiales Mosis Maimonidæ cap. 11, § 2. Et Mosem de Kotzi præcepto jubente XVI.

[g] *Mahumetistas*] Vide Leunclavium *Turcicorum* v. et XVII.

[2] Videtur heic deesse *dolosæ*, aut aliud simile: ut patet ex verbis sequentibus, *sine dolo culpa sufficit.* Non est in promtu SYLVESTER ille, ad cujus sententiam heic respicit Auctor noster. *J. B.*

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prevented when they could. So the generals are responsible for what is done by their order; and the soldiers severally and jointly who have joined in any act; as the burning of a city: and in separable acts, each for what he did, or aided in doing.

V. 1 Nor do I conceive that the exception is to be admitted, of those who act for others, if they have committed any fault [with deceit, *J. B.*]; for to make restitution be proper, fault is enough without deceit. There are some who seem to think that things taken in war, even if there were no just cause of the war, are not to be restored, because the belligerents are understood to have given such things to the captors. But no one can be lightly presumed to set his property on a cast: and war of itself is far removed from the nature of a contract. And in order that neutral parties might have a clear rule to follow, and might not be involved in a war against their will, the introduction of that external ownership, of which we have spoken, was enough; which may consist with the internal obligation of restitution. So the Sam-

videbantur, remisimus. Videbantur, ait, quia injustum id
Lib. viii. 39. bellum fuerat, ut jam ante agnoverant Samnites.

2 Non dissimile est, quod ex contractu sine dolo inito, cui inest inæqualitas, jure gentium nascitur facultas quædam cogendi eum qui contraxit ad implenda pacta: nec eo tamen minus, qui plus æquo stipulatus est rem ad æqualitatem reducere ex probi ac pii hominis officio tenetur. *Vide sup.* ii. 12.

VI. 1 Sed et, qui damnum ipse non dedit, aut sine omni culpa dedit, sed rem bello injusto captam ab alio penes se habet, tenetur eam reddere, quia cur alter ea carere debeat nulla causa subest naturaliter justa, non consensus ipsius, non malum meritum, non compensatio. Non aliena ab hac re historia est apud Valerium Maximum: *populus*, inquit, *Romanus cum P. Claudius Camerinos ductu atque auspiciis suis captos sub hasta vendidisset, etsi ærarium pecunia, fines agris* *Vide sup.* ii. 10. Lib. vi. 5.

[h] *Conquisitos redemit, et prædia restituit*] Antonius Tyrios coegit reddere, quæ Judæorum tenebant. Homines ab eis venditos jussit liberari, bona dominis reddi. Josephus XIV. *Antiquæ Historiæ*, (Cap. 12. § 5. *divis. Hudson.*) Macrinus Parthis reddidit captivos et prædam, quod causa non fuisset, cur

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nites, in Livy, give up what they had taken; *which*, they say, *seemed ours by the right of war: seemed*, because the war was unjust, as the Samnites had confessed.

2 It is a case of the same kind, that an unequal contract, made without deceit, gives, by the Law of Nations, a right of compelling the fulfilment of the compacts; and yet he who has the advantage, is bound by the duty of an honest and pious man, to reduce it to equality.

VI. 1 But also, he who has not caused any damage, or has caused it without any fault, but who has in his possession a thing taken in war from another, is bound to restore it, because there is no cause, naturally just, why the other should be deprived of it; not his consent; not his ill desert; not compensation. There is a story to this effect in Valerius Maximus: *When P. Claudius had taken and sold the people of Camerina, although the money and the conquest were very advantageous, the Roman people sought them out and redeemed them, because the justice of the proceeding did not seem clear; and gave them a dwelling in the Aventine, and restored their property.* So, by a decree of the Romans, the Phocenses had their liberty and land restored. So the Ligurians who had been sold by M. Popilius, were redeemed and restored to liberty, and their property given back. So with regard to the Abderites, the Senate decreed the same thing, adding the reason, that the war had been unjust.

2 But he who holds such property, if he have spent anything upon it, may deduct as much as it was worth to the owner to recover

auctos animadvertebat, tamen, quia parum liquida fide id gestum ab imperatore videbatur, maxima cura [h]*conquisitos redemit, iisque habitandi gratia locum in Aventino adsignavit, et prædia restituit.* Similiter Phocensibus Romanorum Liv. xxxviii. 39.
decreto reddita libertas etiam illa publica et qui erepti erant agri. Et postea [i]Ligures qui a M. Popillio venditi fuerant, reddito emtoribus pretio restituti sunt in libertatem, bona Liv. xlii. 8.
quoque reddi curata. Idem de Abderitis decrevit senatus, addita causa quod injustum bellum illatum iis esset. *Idem* xliii. 6.

2 Poterit tamen, si quid sumtus aut operæ impendit is, qui rem tenet, deducere tantum, quantum domino valebat adipisci desperatam possessionem, secundum ea quæ alibi explicata sunt. Quod si rei possessor culpæ exsors eam consumserit aut alienaverit, non tenebitur nisi in quantum censeri potest locupletior factus.

Romani pacem rumperent. Herodianus libro IV. in fine. Mahumetes Turca liberari jussit eos, qui fuerant in oppido Sanctæ Mariæ in Achaia. Chalcocondylas libro IX.

[i] *Ligures*] Vide *Excerpta Peiresciana* Diodori Siculi. (Pag. 298.)

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possession, as we have elsewhere explained. If the possessor have without fault consumed or alienated the thing, he is not bound, except so far as he is made richer.

[This and the succeeding chapters point out the Restraints which morality and religion impose on the exercise of Rights. That the exercise of rights will be restrained by morality and religion, wherever these prevail among men, is so obvious, that it does not need any large array of authorities to prove it: and the application of such views has, in some measure, modified the received usages of war among Christian nations. I shall, therefore, considerably abridge the illustrative matter in this part. Of the Laws of War so modified, see *Elements of Morality*, 1061, &c. W. W.]

CAPUT XI.

TEMPERAMENTUM CIRCA JUS INTERFICIENDI IN BELLO JUSTO.

I. *In bello justo actus quosdam interna justitia carere quod exponitur:*
II. *Interfici qui possint secundum justitiam internam.*
III. *Ob infortunium neminem recte interfici, ut qui coacti partes sequuntur:*
IV. *Nec ob culpam mediam inter infortunium et dolum: cujus natura explicatur.*
V. *Distinguendos auctores belli ab his qui sequuntur.*
VI. *In ipsis auctoribus distinguendas causas probabiles ab improbabilibus.*
VII. *Etiam mortem meritis hostibus sæpe pœnam recte condonari.*
VIII. *Cavendum, quantum fieri potest, ne innocentes, etiam præter propositum, occidantur.*
IX. *Pueris semper parcendum: feminis, nisi quid gravius admiserint: et senibus.*
X. *Parcendum et his, qui sacra aut literas tantum curant:*
XI. *Et agricolis:*
XII. *Et mercatoribus ac similibus:*
XIII. *Et captis.*
XIV. *Recipiendos, qui dedere se volunt sub æquis conditionibus.*
XV. *Parcendum et his qui sine conditione se dediderunt.*
XVI. *Hæc ita vera, nisi grave delictum antecesserit: quod quomodo accipiendum.*
XVII. *Delinquentibus ob multitudinem recte parci.*
XVIII. *Non occidendos obsides, nisi ipsi deliquerint.*
XIX. *Abstinendum ab omni dimicatione inutili.*

I. 1 SED nec in bello justo admittendum est, quod dicitur,

Lucan. *Phar.* i. 349.

Omnia dat, qui justa negat.

Offic. i. 11.

Melius Cicero: *Sunt quædam officia etiam adversus eos ser-*

[a] *Est enim ulciscendi et puniendi modus*] Vide quæ supra lib II. cap. XX. § 2. et 28. et loca Augustini de Christianorum in ipsis bellis benevolentia, quæ modo produximus. Aristoteles *Politicorum* V. cap. 6. narrat asperiores æquo pœnas exactas Thebis et Heracleæ, *στασιωτικῶς*, factionis studio. Et Thucydides III. *Τιμωρίας μείζους, οὐ μέχρι τοῦ δικαίου·* *pœnas justo majores.* (Cap. 82.) Tacitus III. *Annalium: Pompeius gravior remediis, quam delicta erant.* (Cap. 28.) Idem eodem libro (Cap. 24.) Augustum culpat, quod

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CHAPTER XI. *Restraints as to the Right of killing in War.*

I. 1 [We have been speaking of the restraints which the injustice of a war imposes;] but even in a just war, we are not to say

vanda, a quibus injuriam acceperis. [a] *Est enim ulciscendi et puniendi modus.* Idem laudat vetera Romanorum tempora, cum exitus bellorum erant aut mites, aut necessarii. Crudeles vocat Seneca, qui *puniendi causam habent, modum non habent.* Aristides Leuctrica prima: ἔστι γὰρ, ἔστι καὶ ἀμυνομένους ἀμέτρως ἀδικεῖν. κἄν τις οἷς τὰς τιμωρίας ἀναπληροῖ, πρὸς τ' ἀδικήματα τούτοις ὑπερβῇ, δεύτερος ἄρχει πάλιν. *Possunt sane, possunt etiam, qui se vindicant, injusti esse, si modum excedant. Nam et qui in puniendo progreditur ad id quod iniquum est, secundus est injuriæ auctor.* Sic, Ovidio judice, rex quidam

Offic. ii. 8.

ii. *de Clem.* c. 4.

Pag. 94. Tom. II.

Cæde nocentum
Se nimis ulciscens exstitit ipse nocens.

De Pont. i. *Eleg.* viii. 19, 20.

2 Platæenses in Isocratea oratione quærunt: εἰ δίκαιόν ἐστιν ὑπὲρ τηλικούτων ἐγκλημάτων οὕτως ἀνόμους καὶ δεινὰς ποιεῖσθαι τὰς τιμωρίας; *an æquum sit, ob tantilla peccata tam graves et iniquas pœnas exigere?* Idem ille Aristides secunda pro pace: μὴ τοίνυν ἀνθ' ὅτων αὐτοὺς τιμωρήσεσθε, σκοπεῖτε, ἀλλ' οὕς τινας ὄντας, καὶ τίνες ὄντες αὐτοὶ καὶ τὸ μέτρον τῆς τιμωρίας· *non hoc tantum respicite, quas ob causas pœnas sitis exacturi, sed et qui sint de quibus sumenda sit pœna, qui nos ipsi, et quis justus pœnarum modus.* Laudatur Propertio Minos (Lib. III. *Eleg.* XVII. 28):

Pag. 293 B

Pag. 77 A. Tom. II.

in puniendis adulteriis clementiam majorum suasque ipse leges egressus sit. Juvenalis (*Sat.* x. vers. 314, *et seqq.*):

exigit autem
Interdum illo dolor plus quam lex ulla dolori
Concessit.

Quintilianus: *non nisi ab ultimo parricidio exigitur pœna trans hominem.* [Id est, a cadavere. *Declamat.* VI. cap. 10. p. 137. *Edit. Burm.*] M. Antoninus Imperator, referente Vulcatio *vita Cassii,* (cap. 11.) *ad senatum scribam, ne aut proscriptio gravior sit aut pœna crudelior.* Ausonius [*Cupid. Crucif.* vers. 93, 94]:

vindictaque major
Crimine visa suo est.

Ammianus libro XXVI. *sævitum est in multos acrius quam errata flagitaverant vel delicta* (Cap. 10.) Similis est apud Agathiam locus libro III. [Lib. IV. cap. 6.]

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with Lucan, *He who denies justice, gives everything.* Better Cicero, *There are duties even against those who have injured us. There is a limit to punishment and revenge.* And he praises the old times of Rome, when the event of a war was either mild or necessary. So Seneca. So Aristides says that over-punishment makes a new injury; and so Ovid.

2 So the Plateans in Isocrates, and so Aristides, speak of a measure of punishment proportioned to the offense. So Propertius and Ovid.

Victor erat quamvis, [b]æquus in hoste fuit.

Sed et Ovidio (*Metam.* VIII. 101):

Leges captis justissimus auctor
Hostibus imposuit.

II. Quando autem justa sit interfectio (inde enim nobis incipiendum est) in bello justo secundum justitiam internam, quando non sit, ex iis intelligi potest quæ capite primo hujus libri nobis explicata sunt. Interfici enim aliquem contingit ex proposito, aut citra propositum. Ex proposito juste interfici nemo potest, nisi aut in pœnam justam, aut quatenus absque eo vitam et res nostras tueri non possumus: quamquam illud ipsum ob res caducas hominem occidere, etiamsi a justitia stricte dicta non abeat, a caritatis tamen lege discedit. Pœna vero justa ut sit, opus est ut ipse qui interficitur deliquerit, et quidem tantum quod apud æquum judicem mortis supplicio possit vindicari: qua de re eo nunc minus disseremus, quia quicquid ejus sciri oportet, satis explicatum arbitramur capite de pœnis.

Vict. *de jure belli*, n. 36. et 43.

III. 1 Supra, cum de supplicibus ageremus (sunt autem ut in pace, ita et in bello supplices,) discrevimus ἀτύχημα καὶ ἀδίκημα, *infortunium et injuriam.* Gylippus eo quem ibi citare cœpimus Diodori Siculi loco quærit, utra in classe Athenienses poni debeant, infortunatorum an injustorum: et pro infortunatis habendos negat qui ultro nulla lacessiti injuria Syracusanis bellum intulissent: unde infert eum sponte bellum

Bibl. xiii. 29.

[b] *Æquus in hoste fuit*] Ovidius tristium I. elegia 8 (vers. 35):
Est etiam in miseris pietas, et in hoste probatur.

[c] *Necessitas egerat, non voluntas*] Addit mox: *id enim æquitate pensata statuerat placabilis Imperator et clemens.* Thucydides libro III. (cap. 39) in oratione Cleonis: οἵ τινες ὑπὸ τῶν πολε-

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II. What killing is just in war, according to internal justice, we may see from what has been said. A man may be killed of purpose, or not of purpose. No one can be justly killed of purpose, except either as a just punishment, or so far as we cannot otherwise defend our life and property. And even this step, of killing a man for perishable human property, is at variance with the law of charity. In order that punishment may be just, it is necessary that he who is killed should have himself offended, and so offended, that a just judge would think death a fit punishment. Of this we have spoke, in treating of punishment.

III. 1 Above, in speaking of suppliants (for there are such in war as in peace, namely, those who ask for mercy,) we distinguished

susceperint, ferenda quoque ab ipsis belli mala. Infortunatorum exemplum sunt illi, qui non hostili animo apud hostes sunt, quales Athenienses temporibus Mithridaticis, de quibus sic loquitur Velleius Paterculus: *si quis hoc rebellandi tempus, quo Athenæ oppugnatæ a Sulla sunt, imputat Atheniensibus, nimium veri vetustatisque ignarus est: adeo enim certa Atheniensium in Romanos fides fuit, ut semper et in omni re, quicquid sincera fide gereretur, id Romani Attica fieri prædicarent. Ceterum tum oppressi Mithridatis armis homines miserrimæ conditionis, cum ab inimicis tenerentur, oppugnabantur ab amicis, et animos extra mœnia, corpora necessitati servientes intra muros habebant:* quæ pars postrema ex Livio sumta videri potest, apud quem Indibilis Hispanus corpus duntaxat suum apud Carthaginienses, animum apud Romanos ait fuisse.

Lib. ii. 23.

Lib. xxvii. 17.

2 *Nimirum*, ut ait Cicero, *omnes, quorum in alterius manu vita posita est, sæpius cogitant, quid possit is, cujus in ditione ac potestate sunt, quam quid debeat facere.* Idem pro Ligario: *tertium est tempus, quo post adventum Vari in Africa restitit: quod si est criminosum, necessitatis crimen est, non voluntatis.* Atque hoc secutus est Julianus in causa Aquileiensium, teste Ammiano, qui cum paucorum supplicium narrasset, adjicit: *residui omnes abierunt innoxii, quos in certaminum rabiem* [c]*necessitas egerat, non voluntas.* Ad Thucydidis locum de Corcyrensium captivis venditis vetus

Pro Quint. c. 2.

Lib. xxi. 12.

Lib. i. 55.

μίων ἀναγκασθέντες ἀπέστησαν, συγγνώμην ἔχω· ignosco illis, qui defecerunt a nobis, cogente hoste. Contemplatio extremæ necessitatis hæc dicitur Paulo sententiarum v. tit. 1. § 1. certe enim, ut Synesius ait, *ἰσχυρὸν ἀνάγκη πρᾶγμα καὶ βίαιον· res est valida ac violenta necessitas.* Juvenalis de Cala-

misfortune and misdeed. So Gylippus considers to which class the Athenians belong, and says they were not men unfortunate, but unjust, and must therefore bear the evils of war. Of unfortunate persons, examples are those who are with the enemy, without being hostile in mind, as the Athenians at the time of Mithridates. So Paterculus describes them, applying what Livy says, of Indibilis the Spaniard, that his body was with the Carthaginians, his mind with the Romans.

2 So Cicero speaks of faults of necessity, as opposed to those of will: so Julianus, the commentator on Thucydides, says, that according to the mild spirit of the Greeks the Corcyrean captives were spared on this ground. The Plateans plead the same excuse in Isocrates;

commentator: τὸ ἥμερον τοῦ ἑλληνικοῦ τρόπου δηλοῖ, καὶ ὡς ἀπηνὲς μετὰ μάχην τοὺς ἑαλωκότας θανατοῦν, ἄλλως τε καὶ δούλους, τοὺς μὴ μετὰ γνώμην οἰκείαν πολεμοῦντας· *ostendit clementiam dignam Græcorum ingeniis: durum enim post pugnam captos occidere, servos præsertim, qui non sua* Pag. 299 A. *voluntate bellum gerunt.* Platæenses in dicta oratione apud Isocratem: οὐ γὰρ ἑκόντες, ἀλλ' ἀναγκασθέντες αὐτοῖς ἐδουλεύομεν· *non volentes, sed coacti illis* (Lacedæmoniis) Ibid. c. *servivimus.* Idem de Græcis aliis: τοῖς σώμασι μὲν ἐκείνοις ἀκολουθεῖν ἠναγκάζοντο, ταῖς δὲ εὐνοίαις μεθ' ὑμῶν ἦσαν· *illorum* (Lacedæmoniorum) *partes corpore sequi cogebantur,* Lib. ix. 17. *animo vobiscum erant.* Herodotus de Phocensibus dixerat: ἐμήδιζον οὐχ ἑκόντες, ἀλλ' ὑπ' ἀναγκαίης. *Medorum partes sequebantur, non sponte, sed vi necessitatis.* Zelitis, ut Ar-Lib. i. 18. rianus narrat, pepercit Alexander, ὅτι πρὸς βίαν ἔγνωσαν συστρατεῦσαι τοῖς βαρβάροις, *quod coacti fuissent militare* Lib. xiii. 27. *in partibus barbarorum.* Nicolaus Syracusanus apud Diodorum in oratione pro captivis: οἱ σύμμαχοι τῇ τῶν κρατούντων ὑπεροχῇ βιασθέντες, ἠναγκάσθησαν συστρατεύειν· διόπερ, εἰ τοὺς ἐξ ἐπιβουλῆς ἀδικήσαντας δίκαιόν ἐστι τιμωρεῖσθαι, τοὺς ἀκουσίως ἁμαρτάνοντας προσῆκον ἂν εἴη συγγνώμης ἀξιοῦν· *socii vi imperantium adacti sunt militare: quare, sicut par est eos puniri, qui data opera injuriam*

guritanis (*Sat.* xv. 103):

> Quisnam hominum veniam dare, quisve Deorum
> Viribus abnueret dira atque immania passis?

Vide de famis necessitate Cassiodorum ix. 13. Pertinax de Læto et aliis: *paruerunt inviti commodo: sed, ubi habuerunt facultatem, quid semper voluerint, ostenderunt.* (Capitolin. cap. 5.) Cassius Clemens apud Xiphilinum in rebus Severi: ἐγὼ οὔτε σε οὔτε Νίγρον ἠπιστάμην· καταλειφθεὶς δὲ δὴ ἐν τῇ ἐκείνου μερίδι, τὸ παρὸν ἀναγκαίως ἐθεράπευσα, οὐχ ὡς σοὶ πολεμήσων, ἀλλ' ὡς Ἰουλιανὸν καταλύσων· *ego neque, te neque Nigrum noveram, sed in parte, quam ille obtinebat, relictus, feci quod necesse erat, præsenti parui, non tibi bellum volens inferre, sed Julianum depellere.* (Pag. 299. *Ed. Rob. Steph.*) Aurelianus Antiochiam ingressus, ubi multi Zenobiæ partes secuti fuerant, edictum proposuit, [referente Zosimo, Lib. i. cap. 51. *Edit. Cellar.*] τῷ ἀκουσίῳ καὶ ἀναγκαίῳ πλέον ἢ προαιρέσει τὰ συμ-

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and the other Greeks. So Herodotus of the Phocians. So Alexander spared the Zelites. So Nicolaus of Syracuse, pleading for the captives. So the Syracusans in Livy. So Antigonus said that he made war on Cleomenes, not on the Spartans.

IV. 1 But we must note that, between a clear injury and a mere misfortune, there is a middle case, composed of both; so that the act

inferunt, ita æquum est ignosci his, qui præter voluntatem suam peccant. Sic et apud Livium Syracusani Romanis se purgantes aiunt, se metu ac fraude turbatis, pacem oppressam. Similem ob causam Antigonus bellum se cum Cleomene, non cum Spartanis habuisse dicebat.

Lib. xxv. 29.

Just. xxviii. 4.

IV. 1 Sed notandum est, inter plenam injuriam et merum infortunium medium sæpe aliquid intercedere, quod ex utroque quasi conflatum sit, ita ut actio neque mere scientis et volentis, neque mere aut ignorantis, aut inviti dici possit.

2 Aristoteles huic generi nomen posuit ἁμάρτημα, latine culpam aliquam liceat dicere. Sic enim ille Moralium libro quinto, capite decimo: *Eorum, quæ sponte facimus, alia facimus deliberato, alia non deliberato. Deliberato fieri dicuntur, quæ præeunte consultatione quadam animi fiunt, quæ vero aliter, indeliberato. Cum ergo damni datio tribus modis in hominum societate contingat, ea, quæ ab ignorantia procedit,* [1] *infortunium dicitur, ut, si quis egerit quippiam, non in quem existimabat, aut quod non putabat, aut non quo putabat modo, aut non tali fine: ut si quis se ferire non hoc instrumento, non hunc hominem, aut non hujus rei causa credidit: sed evenit quod ipse non proposuerat sibi: puta vellicare voluit, non vulnerare, aut non hunc, non hoc modo.*

βάντα ἀνατιθείς· *magis ad necessitatem impositam invitis quam ad voluntatem, quæ acta erant referens.* Belisarius apud Procopium *Vandalicorum* I. Λίβυας γὰρ ἅπαντας γενέσθαι ὑπὸ Βανδίλοις οὔτε ἐθελουσίους· *Afros enim omnes sub Vandalis fuisse invitos.* (Cap. 20.) Apud eundem *Gotthicorum* III. (cap. 7.) Totilas Neapolitanis ait, scire eos sub hostibus fuisse invitos. Nicetas autem, aut continuator scriptæ ab eo historiæ, de Henrico loquens fratre Balduini: τὸ ἐνοικοῦν ἐνδοὺς εἰς σφαγὴν, ὡς εἰ ποίμνιον ἦν καὶ βουκόλιον, ἀλλ' οὐ χριστώνυμον τὸ κτεινόμενον, καὶ βίᾳ μᾶλλον ἢ πειθοῖ τοῖς Βλάχοις ὑποκύψαν, μηδὲ προσχωρῆσαν ἑκουσιότητι· *qui urbem incolebant, eos jussit interfici, quasi armentum aut grex essent, non Christiani homines qui interficerentur, præsertim tales, qui Blachis non verborum suasu, sed vi succubuerant, neque sponte eis paruerant.*

[1] Immo *culpa aliqua:* est enim heic in Græco, ἁμάρτημα. *J. B.*

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can neither be said to be that of one simply knowing and willing, nor of one ignorant or unwilling.

2 This is what Aristotle calls ἁμάρτημα, and we may call *culpa*, a fault. The passage is in *Eth.* v. 10. *There are three cases in which damage may be done to men: by misfortune, by fault, and by injury. But injury may be done, willingly indeed, but not deliberately, as when it is done through sudden anger.*

Ergo, si ita præter id, quod exspectari potuit, damnum detur, erit infortunium. At, si ita, ut exspectari ac prævideri aliquo modo potuerit, sed non improbo animo, culpa erit aliqua: nam culpæ affinis est, qui in se habet agendi principium: qui vero extra, infelix. At, quoties quis id, quod facit, sciens facit, non tamen deliberato, fatendum est adesse injuriam: ut quæ facere homines solent per iracundiam et perturbationes similes aut naturales aut necessarias: nam, qui ira commoti lædunt et culpam admittunt, ab injuria non vacant: neque tamen injusti aut improbi dicuntur: at, si quis idem consulto admittat, is vero improbus et injustus recte nominabitur.

3 *Merito igitur, quæ per iram fiunt, censentur non ex proviso fieri: non enim incipit is, qui ex ira quid facit, sed is qui iram provocavit: atque eo fit, ut sæpe in judiciis rerum ejusmodi non facti, sed legitima fiat quæstio: nascitur enim ira ex eo, quod quis injuriose factum existimat. Non ergo sicut in contractibus, an hoc factum sit, disputant: ibi enim, nisi quæ intercesserit oblivio, omnino altera partium improba est, quæ fidem non implet: sed, an juste factum sit, quod factum est, exquiri volunt. At qui prior struxit insidias, nihil ignorans fecit: quare non mirum si alter sibi injuriam factam putat, alter non putat...Est tamen ut et qui tali ex causa lædit, injustus censeri debeat, si nempe æqualitatis aut proportionis normam excedat, quod reponitur. Sic justus est, qui deliberato juste agit: alioqui juste agere potest aliquis sponte tantum, non et deliberato.*

4 *Ceterum eorum, quæ non sponte fiunt, alia venia digna sunt, alia minus.* [d] *Venia digna, quæ non ab ignorantibus modo, sed et ob ignorantiam fiunt. At, si qua ab ignorantibus admittantur, nec tamen per ignorantiam, sed tali animi morbo, qui communes humanæ naturæ fines exce-*

[d] *Venia digna, quæ non ab ignorantibus modo, sed et ob ignorantiam fiunt*] Dionysius Halicarnassensis libro I. (cap. 58.) ἅπαν συγγνώμης ἄξιον τὸ ἀκούσιον· *quod non sponte fit, omne dignum venia.* Procopius *Gotthicorum* III. ὅσοι μὲν ἀδικοῦσι τοὺς πέλας, ἢ προλαβούσης ἀγνοίας, ἢ λήθης ἐπιγενομένης τινὸς, τούτους ἄξιον τοὺς τὰ δεινὰ πεπονθότας ξυγγνώμονας εἶναι· *qui aliis molesti*

3 *Anger at supposed wrong is some excuse.*

4 *What is done through ignorance is excusable.*

5 Michael Ephesius comments, and explains, this passage. So

dat, non digna sunt, quibus ignoscas. Locum sane egregium et usus maximi integrum latine posui, quia minus recte verti, ideoque nec satis intelligi solet.

5 Michael Ephesius eum locum interpretans, ejus quod exspectari non potuit, exemplum ponit in eo, qui fores aperiens vii. *Nic.* 11. patrem læsit, aut in loco solitario jaculando se exercens aliquem vulneravit. Ejus, quod prævideri potuit, sed sine dolo, in eo qui jaculatus est in via publica. Idem scriptor necessitatis exemplum ponit in eo, qui fame aut siti adigitur, ut quid faciat: perturbationum naturalium, in amore, dolore, metu. Per ignorantiam fieri ait, ubi factum ignoratur, ut si quis mulierem nesciat nuptam. Ab ignorante non per ignorantiam, ubi jus ignoratur. Jus autem ignorari interdum excusabiliter, interdum inexcusabiliter: quæ cum Jurisconsultorum dictis *D. et C. de juris et facti ign.* optime congruunt. Est ejusdem Aristotelis locus huic non dissimilis libro de arte oratoria: *æquitas imperat, ne pari* Lib. i. 13. *loco habeamus injurias et culpas, neque item culpas et infortunia. Infortunia autem sunt, quæ nec provideri potuerunt, nec improbo animo admittuntur: culpæ, quæ provideri potuerant, non tamen improbo animo fiunt: injuriæ, quæ et destinato et animo improbo.* Tria hæc notarunt veteres, et in illo Homeri versu de Achille Iliados postremo: vs. 157, 186.

Οὔτε γάρ ἐστ' ἄφρων, οὔτ' ἄσκοπος, οὔτ' ἀλιτήμων.

Non ignara illi, male provida, nec mala mens est.

6 Similis est divisio apud Marcianum: *delinquitur aut* L. 2. § 2. D. *de pœnis.* *proposito, aut impetu, aut casu: proposito delinquunt latrones, qui factionem habent: impetu autem, cum per ebrietatem ad manus aut ad ferrum venitur: casu vero, cum in venando telum in feram missum hominem interfecit.* Duo illa, quæ proposito et impetu fiunt, hunc in modum distinguit Cicero: *Sed in omni injustitia permultum interest,* [e]*utrum* De Offic. i. 8. *perturbatione aliqua animi, quæ plerumque brevis est et ad*

sunt, sive quod occupaverit eos ignorantia, sive quod oblivio supervenerit aliqua, his etiam ipsos, qui mala sunt passi, æquum est veniam dare. (Cap. 9.)

[e] *Utrum perturbatione aliqua animi, quæ plerumque brevis est et ad tempus, an consulto et cogitato fiat injuria*] Seneca *de Ira* i. 16. *Dimittit sæpe, si intelligit non ex alto venire nequitiam, sed summo, quod aiunt, animo inhærere.*

Aristotle in his *Rhetoric.* And the ancients quote Homer to the same effect.

6 A similar division is given in Marcian, of delicts *proposito, im-*

tempus, an consulto et cogitato fiat injuria. Leviora enim sunt quæ repentino aliquo motu accidunt, quam ea quæ meditata et præparata inferuntur. [f]Philo autem in legum specialium explicatione sic ait: ἡμίεργον τὴν πρᾶξιν εἶναι τῆς διανοίας μὴ προκατεσχημένης ἐκ μακροῦ τοῖς μιάσμασι· *dimidiatum esse facinus, ubi non antecessit longa animi deliberatio.*

7 Cujus generis ea præcipue sunt, [g]quæ necessitas, si non Pag. 449 B. defendit, tamen excusat. Nam ut Demosthenes ait in Aristocratem, αἱ ἀναγκαῖαι χρεῖαι τοὺς τοῦ τί πρακτέον, ἢ μὴ, λογισμοὺς ἀναιροῦσιν ἅπαντας. ὥστ' οὐ πάνυ ταῦτα ἀκριβολογεῖσθαι δεῖ τὸν δικαίως ἐξετάζοντα· *necessitatis impulsus auferunt dijudicationem de eo quod agendum vel non agendum est: quare non nimis rigide expendenda hæc sunt ab æquis rerum arbitris.* Qui sensus etiam latius ab eodem exPag. 616 B. primitur in oratione de falso testimonio adversus Stephanum. Cap. 98. Thucydides libro quarto: πᾶν δ' εἰκὸς εἶναι τῷ πολέμῳ καὶ δεινῷ τινι κατειργόμενον ξύγγνωμόν τι γιγνέσθαι καὶ πρὸς τοῦ Θεοῦ. καὶ γὰρ τῶν ἀκουσίων ἁμαρτημάτων καταφυγὴν εἶναι τοὺς βωμοὺς παρανομίαν τε ἐπὶ τοῖς μὴ ἀνάγκῃ κακοῖς ὀνομασθῆναι, καὶ οὐκ ἐπὶ τοῖς ἀπὸ τῶν ξυμφορῶν τι τολμήσασι· *credibile esse* [h]*apud Deum quoque paratam esse veniam his, qui bello aut qua simili necessitate tracti aliquid ad-*

Deinde: *nonnunquam magna scelera levius quam minora compescit, si illa lapsu, non crudelitate commissa sunt, his inest latens et aperta et inveterata calliditas. Idem delictum in duobus non eodem modo afficiet, si alter per negligentiam admisit, alter curavit, ut nocens esset.*

[f] *Philo*] Lib. II. specialium legum. (Pag. 791 B. *Ed. Paris.*)

[g] *Quæ necessitas, si non defendit, tamen excusat*] Adde quæ supra Lib. II. cap. XX. § 29. et hoc capite supra § 3. Samii apud Thucydidem libro III. Alcidæ Lacedæmonio, cum captivos Chios occideret, hæc dicunt: οὐ καλῶς τὴν Ἑλλάδα ἐλευθεροῦν αὐτὸν, εἰ ἄνδρας διέφθειρεν, οὔτε χεῖρας ἀνταιρομένους, οὔτε πολεμίους, Ἀθηναίων δὲ ὑπ' ἀνάγκης ξυμμάχους· *non recte eum se dicere venisse ad liberandam Græciam, qui homines interficeret nec manibus ipsi contrarios, nec animo infestos, Atheniensium quidem socios, sed necessitate adactos.* (Cap. 32.) Chrysostomus *de Providentia* V. καὶ ἐχθροὶ μὲν καὶ πολέμιοι τοῖς αὐτῶν πολεμίοις ἴσασι συγγινώσκειν, ὅταν ἄκοντες καὶ μὴ βουλόμενοι πράττωσί τι τῶν χαλεπωτάτων αὐτοῖς· *norunt et inimici inimicis et hostes hostibus ignoscere, ubi inviti ac contra voluntatem aliquod in ipsos quamvis grave patrant.* (Tom. VI. pag. 877. *Ed. Eton. Savil.*) Misimiani apud Agathiam III.

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petu, casu. The first two are distinguished by Cicero. So Philo says, that without purpose prepense, the deed is reduced to half.

7 The principal examples are those which necessity, if it do not

mittunt: nam et Deorum altaria perfugium patere culpis non voluntariis: et injustitiam iis adscribi qui ultro mali sunt, non his quos ad audendum res extremæ impellunt. Cærites apud Livium ad Romanos: *ne appellarent consilium,* Lib. vii. 20. *quæ vis ac necessitas appellanda esset.* Justinus *factum* Lib. viii. 1. *Phocensium, tametsi omnes execrarentur propter sacrilegium, plus tamen invidiæ Thebanis, a quibus ad hanc necessitatem compulsi fuerant, quam ipsis intulit.* Sic, Isocrate judice, qui salutis causa prædatur, ἔχει πρόσχημα τῆς ἀδικίας τὴν ἀνάγκην, *habet necessitatem injuriæ velamentum.* Aristides Leuctrica secunda: αἱ δυσκολίαι τῶν Tom. II. p. 145 c. καιρῶν ἀπολογίας ἐνδιδόασι τοῖς ἀφεστηκόσιν· *difficilia tempora excusationem aliquam dant desciscentibus.* De Messeniis accusatis, quod ab Athenis exules non recepissent, ita Philostratus: ἡ ἀπολογία κατὰ ξυγγνώμην ἵσταται, τὸν *Vit. Soph.* ii. 15. § 2. Ἀλέξανδρον προϊσχομένων καὶ τὸν ἐκείνου φόβον, οὗ μηδὲ ἡ p. 596. ἄλλη Ἑλλὰς ἀπείρος εἶχε· *causa ipsorum in deprecatione posita est, obtendens facto Alexandrum, et metum ab ipso, nulla non pars Græciæ experta esset.* Talis et ille apud Aristotelem, ἡμιπονηρὸς καὶ οὐκ ἄδικος, οὐ γὰρ ἐπίβουλος· *Ethic. Nic.* vii. 11. *semipravus, non injustus:* [i]*neque enim insidiator.* Discrimina hæc ad argumenti nostri usum sic aptat Themistius in laudibus Valentis Imperatoris: καὶ διέκρινας τὸ ἀδίκημα, καὶ ἁμάρ- *Orat.* ix. p. 209.

γένος πλεῖστα προηδικημένον, οὕτω τε ἐληλυθὸς εἰς τὸ ἀντιδρᾶσαι, βαρβάρῳ καὶ τοῦτο ἀνοίᾳ, οὐ μὲν παντάπασί γε φειδοῦς καὶ συγγνώμης ἀνάξιοι ἔφασκον εἶναι· *cum plurimas perpessi injurias ita trusi essent ad talionem barbaro sane impetu, attamen non omnino indignos esse, quibus ignosceretur parceretur que.* [Lib. IV. cap. 6.]

h *Apud Deum quoque paratam esse veniam*] Deuteronomii xxii. 26. Moses Maimonides *Ductore dubitantium* III. 41.

i *Neque enim insidiator*] Mitylenæorum causam hac parte onerat Cleon apud Thucyd. III. ἄκοντες μὲν γὰρ οὐκ ἔβλαψαν, εἰδότες δὲ ἐπεβούλευσαν· ξύγγνωμον δέ ἐστι τὸ ἀκούσιον· *non inviti nobis nocuere, sed de industria fecere insidias. Id vero demum ignosci dignum est, quod præter voluntatem fit.* (Cap. 40.) Philo libro *de Constituendo Principe:* διακρίνει δ', ὁπότε πρὸς ἄμυναν ἴοι, τοὺς ἐπιβούλως ζῶντας καὶ τοὐναντίον. τὸ γὰρ κατὰ πάντων καὶ τῶν ἐλάχιστα ἢ μηδὲν ἡμαρτηκότων φονᾷν, ἀνημέρου καὶ ἀτιθάσσου ψυχῆς· *si ad ultionem veniendum sit, novit discernere inter eos, qui vitam agant insidiatricem, et eos, qui longe alterius sunt animi. In omnes enim, etiam qui minima aut nihil deliquerunt, grassari cædibus animi est immansueti ac feri.* (Pag. 734 B.)

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justify, at least excuses. So Demosthenes; Thucydides; the Cærites for themselves; Justin for the Phocians; Isocrates; Aristides; Philostratus for the Messenians. So Aristotle speaks of a man *half*

τημα, καὶ ἀτύχημα, καὶ γὰρ εἰ μὴ τὰ Πλάτωνος ἀποστοματίζεις, μηδὲ τὰ Ἀριστοτέλους μεταχειρίζῃ, ἀλλὰ τά γε ἐκείνοις δοκοῦντα τοῖς ἔργοις βεβαιοῖς. οὐ γὰρ τῆς ἴσης τιμωρίας ἀξίους ᾠήθης τούς τε ἐξ ἀρχῆς βουλεύσαντας τὴν ἐπανάστασιν, καὶ τοὺς ὑπὸ τῶν ὅπλων παρασυρέντας, καὶ τοὺς ἤδη τῷ δοκοῦντι κρατεῖν ὑποκύψαντας. ἀλλὰ τῶν μὲν κατέγνως, τοὺς δὲ ἐμέμψω, τοῖς δὲ συνήλγησας. [k]*distinxisti inter injuriam et culpam et infortunium.* [l]*Quanquam nec Platonis verba ediscis, nec Aristotelem tractas, ipsorum tamen placita facto exequeris. Non enim pari pœna dignos existimasti, qui ab initio bellum suaserant, et qui postea abrepti sunt armorum impetu, et qui succubuerunt ei, qui jam rerum potiri videbatur. Sed illos damnasti, hos castigasti, postremos miseratus es.*

Orat. x. p. 259. 8 Idem alibi adolescentem Imperatorem vult discere, *τί διενήνοχεν ἀτύχημα καὶ ἁμάρτημα καὶ ἀδίκημα· καὶ ὅτι προσήκει τὸν βασιλέα, τὸ μὲν οἰκτείρειν, τὸ δὲ ἐπανορθοῦν, μόνον δὲ τὸ ἔσχατον τιμωρεῖσθαι· quid distet infortunium, culpæ aliquid, et injuria: et quomodo regem deceat istius misereri, hanc corrigere, postremam vero solam ultione prosequi.* Sic apud Josephum Titus unum criminis ducem punit *μέχρις ἔργου reipsa*, multitudinem *μέχρι λόγου sola verborum increpatione.* Mera infortunia nec pœnas merentur, nec ad restitutionem damni obligant. Injustæ actiones ad utrum-

Lib. v. *Belli Jud.* c. 13. *Lat.* vi. 6. p. 912 B.

[k] *Distinxisti inter injuriam et culpam et infortunium*] Seneca *Naturalium* II. 44. ubi de fulminibus: *voluerunt admonere eos, quibus adversus peccata hominum fulminandum est, non eodem modo omnia esse percutienda: quædam frangi debere, quædam elidi et distringi, quædam admoneri.*

[l] *Quanquam nec Platonis verba ediscis, nec Aristotelem tractas, ipsorum tamen placita facto exsequeris*] Talis Trajanus inter principes Romanos egregius: *παιδείας μὲν ἀκριβοῦς, ὅση ἐν λόγοις, οὐ μετέσχε· τό γε μὲν ἔργον αὐτῆς καὶ ἠπίστατο καὶ ἐποίει. illius exactæ eruditionis in verbis positæ compos non erat, rem tamen ejus et norat et implebat.* Xiphilinus. (pag. 230. *Ed. Rob. Steph.*) De Marco Aurelio Herodianus: *μόνος τε βασιλέων φιλοσοφίαν οὐ λόγοις, οὐδὲ δογμάτων γνώσεσι, σεμνῷ δ' ἤθει καὶ βίῳ σώφρονι ἐπιστώσατο· solus*

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wicked, not unjust, for the act was not deliberate. Themistius uses this difference in praise of Valens.

8 The same writer elsewhere presses it upon the young Emperor. So in Josephus, Titus makes a difference.

Mere misfortunes neither deserve punishment, nor oblige to recompense of loss: unjust actions do both. The intermediate case, fault, is liable to restitution, but often does not merit punishment, especi-

que. Culpa media ut restitutioni obnoxia est, ita pœnam sæpe non meretur, præsertim capitalem. Ad hoc illud pertinet Valerii Flacci (Lib. iii. vers. 391, et seqq.):

At quibus invito maduerunt sanguine dextræ,
Si sors sæva premat miseros, sed proxima culpæ,
Hos variis mens ipsa modis agit, et sua carpunt
Facta viros resides.

V. Quod monet Themistius [m] distinguendos, qui auctores belli fuerunt, ab his, qui alios ducentes secuti sunt, ejus passim exempla in historiis exstant. Narrat Herodotus Græcos pœnas sumsisse de his, qui Thebanis ad Medos deficiendi auctores fuerant. Sic Ardeæ principes seditionis securi percussi, narrante Livio. Eodem auctore, Valerius Lævinus, *Agrigento capto, qui capita rerum erant virgis cæsos securi percussit: ceteros prædamque vendidit.* Idem alibi: *Atella Calasiaque in deditionem acceptæ; ibi quoque in eos, qui capita rerum erant, animadversum.* Rursum alibi: *quoniam defectionis auctores meritas pœnas a Diis immortalibus et a vobis habent P. C. quid placet de innoxia multitudine fieri? tandem* [2] *ignotum est illis, et civitas data;* nimirum, ut idem alibi loquitur, *ut, unde orta culpa esset, ibi pœna consisteret.* Laudatur apud Euripidem Eteoclus Argivus, quia

Calliop. seu ix. 85. Lib. iv. 10. Lib. xxvi. 40. *Ibid.* c. 16. Lib. viii. 20. Lib. xxviii. 26. *Supplic.* v. 878, *et seqq.*

Culpam ferebat semper illo judice
Reus ipse: non urbs patria, quæ passim mali
Rectoris ergo sustinet calumniam.

principum sapientiam non verbis aut dogmatum cognitione, sed moribus gravibus et vita temperata ostendebat. (Lib. I. c. 2. n. 6. *Ed. Bœcler.*) De Macrino Xiphilinus: τά τε νόμιμα οὐχ οὕτως ἀκριβῶς ἠπίστατο, ὡς πιστῶς μετεχειρίζετο· *leges non tam norat exacte, quam fideliter exequebatur.* (Pag. 342.) De nostro sæculo, Deus, vel tales principes.

m *Distinguendos, qui auctores belli fuerunt*] Vide Gailium Lib. II. *de Pace Publica*, cap. ix. n. 18.

2 Hæc debebant alio charactere edi, quamvis et in prima Editione ita exstent: neque enim verba sunt LIVII, sed Auctoris nostri. Historicus, in fine demum Capitis sequentis, narrat, *ex auctoritate Patrum, latum ad Populum esse, ut* Privernatibus *civitas daretur.* Cap. 21. num. 10. *J. B.*

ally capital punishment. So Valerius Flaccus.

V. Themistius, in the passage above quoted, praises Valens for making a difference between the authors of the war, and their followers: and this is often exemplified in history. So the Greeks, in dealing with the Thebans for joining the Medes. So the leaders of the sedition at Ardea were put to death: so at Agrigentum, Atella, and Calasia; and elsewhere. So Eteocles is praised in Euripides; and the

Lib. iii. 36. Et Athenienses, ut Thucydides narrat, pœnituit decreti adversus Mitylenæos, *πόλιν ὅλην διαφθεῖραι μᾶλλον ἢ οὐ τοὺς αἰτίους, ut totam civitatem potius quam solos defectionis auctores interficerent.* Narratur et Diodoro Demetrius, captis Thebis, decem solos interfecisse auctores defectionis.

Fragm. e. xxi. Ecl. 10.

Vict. *de jure belli*, n. 59.

VI. 1 Sed in ipsis quoque belli auctoribus distinguendæ causæ: sunt enim quædam non justæ quidem, sed tamen tales, ut non improbis possint imponere. Scriptor ad Herennium deprecationis causam æquissimam hanc ponit, si quis, quæ peccavit, non odio neque crudelitate, sed officio et recto studio commotus fecerit. Sapiens Senecæ, *hostes dimittet salvos, aliquando etiam laudatos, si honestis causis pro fide, pro fœdere, pro libertate in bellum accincti sint.* Apud Livium [n]petunt errori veniam Cærites, quod fuerint auxilio consanguineis. Phocensibus, Chalcidensibus et aliis, qui ex fœdere Antiochum juverant, data a Romanis venia. Aristides Leuctrica secunda Thebanos, qui Lacedæmoniorum ductum contra Athenienses secuti erant, ait, *κοινωνεῖν μὲν οὐ δικαίου πράγματος, δικαίῳ δὲ ἑτέρῳ περιστέλλειν τὴν μέμψιν, τῷ πιστοὺς εἶναι τοῖς ἡγουμένοις, in partem quidem venisse injustæ actionis, sed quam justo aliquo velarent, fide in principes sui fœderis.*

Lib. ii. 17. Lib. ii. *de Clem.* c. 7. Lib. vii. 20. App. *Syriac.* p. 98. Tom. II. p. 135 B.

Cap. 2. 2 Cicero *de Officiis* primo conservandos eos dicit, qui non crudeles in bello, non immanes fuerunt: tum bella, quibus imperii gloria proposita est, minus acerbe gerenda esse. Sic

n *Petunt errori veniam*] *Ignosci debere interdum armis superato rectori justum quid sit ignoranti.* Ex Isocrate transcripsit Ammianus in librum xxx. (cap. 8.)

o *Apud Herodianum*] Verba Græca hæc sunt: καὶ Νίγρῳ μὲν πολεμοῦντες οὐχ οὕτως εὐλόγους εἴχομεν αἰτίας ἔχθρας, ὡς ἀναγκαίας. οὐ γὰρ παρ' ἡμῖν προυπάρχουσαν ἀρχὴν ὑφαρπάζων μεμίσητο, ἐν μέσῳ δὲ ἐῤῥιμμένην καὶ ἀμφήριστον οὖσαν, ἑκάτερος ἡμῶν ἐξ

Athenians, for this reason, repented of their decree against the Mitylenians. So Demetrius acted at Thebes.

VI. 1 But also, in the authors of the war, the causes of the act are to be distinguished; for there are some which, though not just, may impose on those who are not bad men. The writer to Herennius puts this as a strong ground of excuse. So Seneca; so the Cærites plead in Livy; so the Phocians and others were pardoned by Rome; so Aristides pleads for the Thebans.

2 Cicero says that those are to be spared, who have fought without cruelty; and that wars for glory should be carried on less bitterly. So Ptolemy tells Demetrius that they were to fight, not for existence, but

Ptolemæus rex Demetrio significat, οὐ περὶ πάντων ἅμα, περὶ δόξης δὲ καὶ ἀρχῆς πολεμητέον αὐτοῖς· *non de rebus omnibus, sed de imperio et gloria inter ipsos certamen esse.* Severus °apud Herodianum: *cum bellum adversus Nigrum gessimus, non ita sane speciosas inimicitiarum causas habebamus; nam positum in medio principatum atque adhuc in disceptatione versantem pari ambitu uterque nostrum ad se trahebat.*

Plut. *in Demet.* p. 891 A.

Lib. iii. 6.

3 Sæpe habet locum, quod de bello Cæsaris et Pompeii est apud Ciceronem: *erat obscuritas quædam: erat certamen inter clarissimos duces: multi dubitabant, quid optimum esset.* Et quod idem alibi: *etsi aliqua culpa tenemur erroris humani, a scelere certe liberati sumus.* Plane ut apud Thucydidem dicuntur venia digna, quæ fiunt μὴ μετὰ κακίας, δόξης δὲ μᾶλλον ἁμαρτίᾳ. De Deiotaro idem ille Cicero: *non ille odio tui progressus, sed errore communi lapsus est.* Sallustius in historiis: *cetera multitudo, vulgi more magis quam judicio, post alius alium quasi prudentiorem secuti.* Quod de bellis civilibus Brutus scripserat, putem non male ad pleraque bella alia referri posse: [p]*acrius esse prohibenda quam in superatos iracundiam exercendam.*

Orat. pro Marc. c. 10.

Ibid. c. 5.

Lib. i. 32.

Orat. pro Deiot. c. 3.

Fragm. vi. 34. *Orat. i. ad Cæs. de Rep. ordin.*

Cic. *ad Brut. Ep.* 2.

VII. 1 Etiam ubi justitia hoc non exigit, sæpe tamen convenit bonitati, [q]convenit modestiæ, convenit animo excelso. *Ignoscendo auxisse populi Romani magnitudinem*, ait Sallustius. Taciti est: *quanta pervicacia in hostem, tanta*

Fragm. i. 13.

Ann. xii. 20.

ἰσοτίμου φιλοτιμίας εἰς αὐτὸν ἀνθεῖλκεν. optime.

p *Acrius esse prohibenda, quam in superatos iracundiam exercendam*] Bembus IX.

q *Convenit modestiæ*] Rex Theuderichus apud Cassiodorum II. 41. *illa mihi feliciter bella provenerunt, quæ moderato fine peracta sunt, is enim vincit assidue, qui novit omnia temperare.*

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for glory and empire. So Severus says of Niger.

3 Often, as Cicero says of the war between Cæsar and Pompey, the case was obscure, and that many doubted which was the better side. And of himself he says, *We may not be free from human fault, but we are free from wickedness.* So he says also of Deiotarus. So Sallust says of the multitude. What Brutus wrote of the civil wars, may be applied to other wars: *That they who raised them were more proper objects of anger than they who were conquered in them.*

VII. 1 Even when justice does not require us to spare men's lives in war, it is often agreeable to goodness, to moderation, to magnanimity. So Sallust says of one, that he *increased the greatness of the*

De Clem. i. 5. *beneficentia adversus supplices utendum.* At Seneca: *ferarum, nec generosarum quidem, permordere et urgere abjectos. Elephantes leonesque transeunt quæ impulerunt.* Sæpe opportunum est illud Maronis (*Æneid.* x. 528):

> Non hic victoria Teucrum
> Vertitur, aut anima una dabit discrimina tanta.

Cap. 16. 2 Est in eam rem insignis locus in libro quarto ad Herennium: *bene majores nostri hoc comparaverunt, ut neminem regem, quem armis cepissent, vita privarent. Quid ita? quia, quam nobis facultatem fortuna dedisset, iniquum erat in eorum supplicio consumere, quos eadem fortuna paulo ante in amplissimo statu collocarat. Quid quod exercitum contra duxit? desino meminisse. Quid ita? quia viri fortis est, qui de victoria contendant, eos hostes putare: qui victi sunt, eos homines judicare; ut possit bellum fortitudo minuere, pacem humanitas augere. At, ille si vicisset, num idem fecisset? non profecto tam sapiens fuisset: quid igitur ei parcis? quia talem stultitiam contemnere, non imitari consuevi.* Si de Romanis hoc accipias (incertum enim hoc, cum et peregrinis et fictis argumentis utatur is scriptor) adversa fronte pugnat cum eo, quod habemus in panegyrico, Eumen. Pan. vi. 10. qui dictus est Constantino Constantii filio: *cautior licet sit qui devinctos habet per veniam perduelles, fortior tamen est qui calcat iratos. Renovasti, Imperator, veterem illam Romani imperii fiduciam, quæ de captis hostium ducibus vindictam*

r *Luce privati aliis regibus dedere documentum*] Nolim reduci hunc morem; tamen et Josua reges captos interfecit. Josephus *Antiquæ Historiæ* v. 1. et *de Sossio* Dion: Ἀντίγονον ἐμαστίγωσε σταυρῷ προσδήσας· *Antigonum virgis cecidit alligatum cruci.* Pag. 463 D. Sed provide addit, ὃ μηδεὶς ἄλλος βασιλεὺς ὑπὸ τῶν Ῥωμαίων ἐπεπόνθει· *quod nemo regum a Romanis victoribus pertulerat.* Est eadem historia apud Josephum libro XV. (cap. 1.) De Maximiano Herculio. [Immo *de Constantino. J. B.*] Eutropius libro X. c. 2. *cæsis Francis atque Alemannis, captisque eorum regibus, quos etiam bestiis, cum magnificum spectaculum muneris parasset, objecit.* De rege Alemannorum patibulo suffixo vide Ammianum XXVII. (cap. 2.) Theuderichus rex Wi-

Roman people by mercy. Tacitus recommends keenness against the enemy, kindness towards the suppliant. Seneca says that it is only the baser wild beasts which tear them that are down; elephants and lions pass them by. So Virgil, of the Trojan feeling.

2 There is a passage to this effect in the book *ad Herennium*, which praises the Romans for sparing those they had vanquished. But to this, other passages may be opposed, as the panegyric of Con-

morte sumebat. Tunc enim captivi reges, cum a portis usque ad forum triumphantium currus honestassent, simulatque in Capitolium currum flectere cœperat Imperator, abrepti in carcerem necabantur unus pro seipso Paulo qui sedentem se acceperat deprecante (lege: *unus Perseus ipso Paulo, qui dedentem se acceperat, deprecante*) *legem illius* Vid. Plut. *Paul. Æmil.* p. 274. *severitatis evasit: ceteri in vinculis* [r] *luce privati aliis regibus dedere documentum, ut mallent amicitiam colere Romanorum, quam exasperare justitiam.* Sed et hic nimis laxe. Dicit quidem Josephus idem de severitate Romanorum in historia interfecti Simonis Barjoræ: sed de ducibus loquitur, qualis Pontius Samnis, non de his, quibus regium esset nomen. Verborum sensus latine sic habet: *finis triumphi erat, post-* *Bell. Jud.* vii. 5. § 6. *quam ad Capitolium Jovis ædem erat perventum: nam ibi exspectare Imperatores mos antiquus patriæ jubebat, donec nuntiata esset mors hostium ducis. Is erat Simon Joræ filius, qui inter captivos in triumpho ducebatur: is tum injecto laqueo in forum trahitur, verberantibus insuper ipsum custodibus. Nam eo in loco mos est Romanis supplicium sumere de damnatis ob noxas capitales. Hic ubi vitam finiisse nuntiatus est, secuta sunt fausta omina, deinde sacrificia.* Idem ferme dicit Cicero Verrina de suppliciis. Cap. 26, 27.

3 De ducibus passim exempla exstant: de regibus aliqua, ut [s] de Aristonico, Jugurtha, Artabasdo: sed tamen præter Persea [t] Syphax, Gentius, Juba, et Cæsarum tempore

sigotthorum Athiulfum Suevorum in Hispania regem capite plectit, memorante Jornande *Historia Gotthica.* (cap. 44.) Nimirum hæc documenta sunt regibus ad modestiam, et ut cogitent, se quoque subjectos, si Deo ita visum, humanis vicibus, et, quod in simili periculo a Solone dictum meminerat Crœsus, de felicitate hominis ante mortem non judicandum.

[s] *De Aristonico*] Vide Appianum Mithridatico in fine. [Pag. 253. *Ed. H. Steph.* ubi de Aristobulo et Tigrane, quos Pompeius triumphans capite plecti jussit.]

[t] *Syphax*] Variant de eo historici: multi tradunt eum prope Romam ante triumphum decessisse: Polybius in triumpho ductum: (Lib. XVI. cap. 12.) Appianus, dum de eo deliberatur, morbo obiisse. (Pag. 15. *Ed. H. Steph.*)

stantine. But this again is too lax. Josephus gives a like example of the Roman severity, speaking of putting to death Simon Barjoras: but he speaks of leaders like Pontius the Samnite, not of kings. Cicero, in his Verrine Oration, says the same.

3 With regard to this putting to death leaders, there are everywhere examples. Some there are of kings, as Aristonicus, Jugurtha,

Caractacus, atque alii tale supplicium evaserunt, ut appareat et belli causas et gerendi modum spectata a Romanis, quos tamen æquo asperiores in victoria fuisse Cicero atque alii agnoscunt. Itaque M. Æmilius Paulus apud Diodorum Siculum

Excerpt. e Lib. xxi. non male in Persei causa Romanos senatores monet, *εἰ μὴ τὸν ἀνθρώπινον φόβον εὐλαβοῦνται, τήν γε τοὺς ὑπερηφανῶς ταῖς ἐξουσίαις χρωμένους μετερχομένην Νέμεσιν αἰδεῖσθαι· si humani nihil metuerent, at divinam vindictam timerent, iis imminentem, qui victoria insolentius utuntur.* Et [u]Plutarchus notat, bellis inter Græcos ipsos etiam hostes regibus Lacedæmoniis manus abstinuisse reverentia dignitatis.

4 Hostis ergo, qui non id, quod humanæ leges permittunt, sed quod sui est officii, quod fas et pium est, volet respicere, parcet etiam hostili sanguini: neminique mortem irrogabit, nisi quo mortem mortive simile quid evitet, aut ob peccata personæ propria, quæ ad capitalem mensuram devenerint. Et tamen quibusdam id meritis aut omnem, aut mortis pœnam condonabit, sive humanitatis intuitu, sive ob alias probabiles

Lib. xvii. 38. causas. Egregie idem, quem dixi, Diodorus Siculus: *αἱ τῶν πόλεων πολιορκίαι καὶ παρατάξεις καὶ τὰ ἄλλα τὰ κατὰ τὸν πόλεμον προτερήματα τὰ πλείονα διὰ τύχην ἢ δι' ἀρετὴν ἐπιτυγχάνεται· ὁ δ' ἐν ταῖς ἐξουσίαις εἰς τοὺς ἐπταικότας ἔλεος μεριζόμενος διὰ μόνης τῆς φρονήσεως γίνεται·*

[u] *Plutarchus notat*] Agide. (Pag. 804 D.)

[x] *Puerum ætas excuset, feminam sexus*] Plinius *Historiæ Naturalis* libro VIII. cap. 16. *Leo ubi sævit, in viros prius quam in fœminas fremit, in infantes non nisi magna fame.* Ad illa Horatii libro IV. ode VI. de Achille (vers. 17, *et seqq.*):

Nescios fari pueros Achivum
Ureret flammis, etiam latentes
Matris in alvo.

Artabasdus, [Gronovius notes that the two former were spurious kings; and that the last was put to death at Alexandria, *M. Antonii scelus*, as Tacitus says]. But besides Perseus, others, as Syphax, Gentius, Juba, and at the time of the Cæsars, Caractacus, escaped this punishment; so that it appears that the Romans regarded the cause of the war, and the mode of conducting it by the enemy: and yet they were too harsh in victory, as Cicero and others acknowledge. And M. Æmilius Paulus, in pleading for Perseus, warns the Roman Senators to fear Nemesis, the divine vengeance, if they use victory insolently. Plutarch notes that, in the Greek wars, even the enemies did no violence to the Lacedæmonian Kings, out of reverence for their dignity.

4 An enemy, therefore, who considers, not what human laws permit, but what is his duty, what is righteous and pious, will spare hostile

urbium expugnationes, secunda prælia, et si quid aliud in bello prosperum, sæpe fortunæ magis quam virtuti debentur. At in summo imperio victis misericordiam impartiri solius prudentiæ opus est. Apud Curtium legimus: *Alexander* Lib. ix. 1. *quanquam belli auctoribus jure poterat irasci, tamen omnibus venia data.*

VIII. De nece autem eorum, qui casu non destinato occiduntur, tenendum, quod supra diximus, si non justitiæ, misericordiæ tamen esse non nisi magnis et ad multorum salutem perventuris causis tale quid aggredi, unde innocentibus imminere pernicies possit. Idem nobiscum sensit Polybius, qui libro v. sic loquitur: *οὐ γὰρ ἐπ' ἀπωλείᾳ δεῖ καὶ ἀφανισμῷ* Cap. 11. *τοῖς ἀγνώμοσι πολεμεῖν τοὺς ἀγαθοὺς ἄνδρας, ἀλλ' ἐπὶ διορθώσει καὶ μεταθέσει τῶν ἡμαρτημένων· οὐδὲ συναναιρεῖν τὰ μηδὲν ἀδικοῦντα τοῖς ἠδικηκόσιν, ἀλλὰ συσσώζειν καὶ συνεξαιρεῖσθαι τοῖς ἀναιτίοις* (male editur *ἐναντίοις*) *τοὺς δοκοῦντας ἀδικεῖν· bonorum virorum est, etiam cum minus probis non internecinum gerere bellum, sed hactenus, ut delicta sarciantur atque emendentur: neque insontes cum sontibus una pœna involvere, sed insontium causa etiam sontibus parcere.*

IX. 1 His cognitis, de his, quæ magis specialia sunt, non difficilis erit definitio. [x] *Puerum ætas excuset, feminam sexus,* ait Seneca libris, quibus iræ irascitur. Deus ipse in Lib. iii. 24.

Ita Scholiastes: *Dolenter declamat in sævitiam Achillis, qui, si per Apollinem vivere licuisset, adeo sævus erat, ut nec infantibus nec in utero gestantibus pepercisset.* Philo *de Principis Constitutione,* (pag. 734.) *παρθένοι δὲ καὶ γυναῖκες μεθείσθωσαν· dimittantur autem virgines et mulieres:* causam reddit, *τὸ προσθήκην ἀνδρῶν πόλεμον κατασκευασάντων ποιεῖσθαι γυναῖκας, ἀνήμερον· virorum, qui bella fabricant, accessionem facere mulieres, immite.* Idem *de*

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blood: and will never inflict death, except either to avoid death, or evils like death, or to punish crimes which are capital in desert. And even to some who have deserved that, he will remit all, or at least, capital punishment, either out of humanity, or for some other plausible causes. So Diodorus says that *victory depends on fortune, but mercy in victory on virtue.* So Curtius, of Alexander.

VIII. With regard to those who are killed without its being intended, we must hold that if justice do not require, at least mercy does, that we should not, except for weighty causes tending to the safety of many, undertake anything which may involve innocent persons in destruction. So Polybius.

IX. 1 Having settled these principles, it will not be difficult to lay down more special rules.

Deut. xx. 14. bellis Hebræorum etiam post pacem oblatam et repudiatam
parci vult feminis et infantibus, extra paucas gentes speciali
jure exceptas, adversus quas quod erat bellum, non erat homi-
num, sed Dei, atque ita appellabatur. Et, cum mulieres Ma-
Num. xxxi. 18. dianitidas vellet occidi ob proprium ipsarum crimen, excepit
virgines intactas. Imo cum Ninivitis ob gravissima peccata
Jon. iv. 11. internecionem severe admodum minatus esset, retrahi se pas-
sus est miseratione multorum millium ejus ætatis, quæ honesti
et inhonesti discrimina ignoraret. Cui similis est apud Sene-
De Ira ii. 9. cam sententia: *num quis irascitur pueris, quorum ætas non-*
Phars. ii. 108. *dum novit rerum discrimina?* Et apud Lucanum:

Crimine quo parvi cædem potuere mereri?

Si hæc Deus fecit ac statuit, qui quosvis homines cujuscumque sexus aut ætatis sine ulla causa non injuste potest occidere, utpote vitæ dator ac dominus, quid homines facere æquum est,

Specialibus Legibus 11. *πρὸς μὲν γὰρ τοὺς τελείους μυρίας προφάσεις εὔλογοι προσκρουμάτων τε καὶ διαφορῶν. τοῖς δὲ κομιδῇ νηπίοις ἄρτι παρεληλυθόσιν εἰς φῶς καὶ τὸν ἀνθρώπινον βίον, οὐδ' ἐπιψεύσασθαι κατηγορίαν ἀκακώτοις οὖσιν ἐνδέχεται· nam in justæ ætatis homines mille speciosi obtentus reperiri possunt discordiarum hac simultatum. At in infantes, qui modo in lucem vitamque humanam venere, ne calumnia quidem quod dicat habet, ut plane innocentes.* (Pag. 795 D.) Josephus *Antiquæ Historiæ* libro IX. *de Manaemo,* (cap. 11.) *μηδὲ νηπίων φειδόμενος, ὠμότητος ὑπερβολὴν οὐ καταλείπων οὐδ' ἀγριότητος. ἃ γὰρ οὐδὲ τῶν ἀλλοφύλων τινὰς συγγνωστὸν δραθῆναι γενομένους ὑποχειρίους, ταῦτα τοὺς ὁμοφύλους οὕτως εἰργάσατο· Ne infantibus quidem parcens nihil fecit reliquum ad crudelitatem, aut feritatem potius. Quæ enim veniam non merebantur, si in externos bello victos essent edita, ea fecit in populares suos.* [Auctor heic tacite legit versu 4 *δραθῆναι* pro *διαθῆναι*, quod erat in Editione Genev. et mutatum est in *διαθεῖναι* ex MSS. in *Edit. Hudson.* Cap. xi. § 1. *J. B.*] Idem Josephus Judam Maccabæum narrat Bosra et Ephrone captis, interfecisse *πᾶν τὸ ἄῤῥεν καὶ μάχεσθαι δυνάμενον· quicquid virilis sexus et pugnæ idoneum erat.* [*Ant. Jud.* Lib. XII. cap. 8. § 5. *divis. Hudson.* ubi tamen hoc tantum legitur: *Καὶ πᾶν ὅσον ἄῤῥεν ἦν ἐν αὐτῇ κτείνας* &c. *J. B.*] Et alibi pœnam, quam Alexander Thracidas dictus de Judæorum pueris et mulieribus sumserat, vocat *ὑπὲρ ἄνθρωπον δίκην, ulti-*

Children are excused by their age, women by their sex, as Seneca says, in the books in which he writes, angrily, *Against Anger.* God himself, even when peace had been offered and refused, directed that women and infants were to be spared, except in a few cases, in which the war was the war of God, not of men, and was so called. And when he directed the Midianitish women to be slain for their crime, he excepted the virgins. And when he had threatened Nineveh with destruction, he was moved to change his purpose, (Jonah iv. 11,) by the consideration that there were so many persons who could not distinguish right from wrong. So Seneca and Lucan speak of children.

quibus ille nullum jus tribuit in homines, quod non ad hominum salutem ac societatem conservandam esset necessarium?

2 Accedit primum de pueris judicium eorum populorum Vict. *de jure belli*, n. 36. ac temporum, quibus fas maxime valuit. *Arma habemus* (ait apud Livium Camillus) *non adversus eam ætatem, cui etiam,* Lib. v. 27. *captis urbibus, parcitur, sed adversus armatos.* Addit hoc esse inter belli jura, naturalia scilicet. Plutarchus de eadem *Vit. Camil.* p. 134. re agens: *sunt,* inquit, *apud bonos etiam belli quædam leges.* Ubi nota illud *apud bonos,* ut hoc jus ab eo, quod in moribus et impunitate positum est, discrimines. Sic Florus negat aliter Lib. i. [3]fieri potuisse salva integritate. Apud Livium alio loco est: Lib. xxiv. 26. *a qua ætate etiam hostes irati abstinerent.* Et alibi: *usque* Lib. xxviii. 20. *ad infantium cædem ira crudelis pervenit.*

3 Quod autem in pueris rationis usum non adeptis semper, id in feminis plerumque obtinet, id est, nisi aliquid peculiari-

onem ultra hominum morem. (*Antiq. Jud.* XIII. cap. 14. § 2.) Agathias libro III. *ἐπειδὴ δ' ὅμως οὐχ ὅσιον καὶ εἰς αὐτὰ δὴ τὰ νεογνὰ βρέφη καὶ τῶν τοῖς γονεῦσι τετολμημένων οὐδὲν ἐπιστάμενα παροινεῖν οὕτω καὶ ἀφυβρίζειν, οὔκουν αὐτοῖς οὐδὲ ἀποινὶ τοῦτο ἡμάρτησαν· quandoquidem vero pium non erat in recens natos infantes paternorum facinorum inscios ita sævire atque insanire, ideo hæc ipsis non impune abiere.* (Lib. IV. cap. 6.) Nicetas, aut qui historiam ejus produxit ad tempora Henrici regis, de Scythis agens, qui Athiram ceperant: *ἀλλ' οὐδὲ τὰ ὑπομαστίδια τῶν παίδων τοῦ καλοῦ ἐφάνη ἀνώτερα, ἀλλ' ἀπεθερίσθη καὶ ταῦτα κατὰ χλόην καὶ ἄνθος εὐμάραντον, ὑπὸ τῶν ἐλέῳ ἀναλώτων ἐκείνων ἀνδρῶν, καὶ μηδαμῶς εἰδότων ὡς ἀδικεῖ τὴν φύσιν καὶ θεσμὸν ἀθετεῖ τὸν ἀνθρώπινον, ὁ περαιτέρω τῆς νίκης καὶ τοῦ κρατεῖν τῶν ἐναντίων θυμῷ χρώμενος· ne infantes quidem lactentes adhuc mali exsortes fuere, sed et hi velut in herba demessi sunt, aut velut flos emarcuere, facto hominum misericordia intactorum, neque scientiam injuriam ab eo fieri naturæ hac fas hominum violari, qui ultra, quam ut hostes vincat aut subigat, extendit iram.* (In Balduin. cap. 9.) Adde quæ Beda habet libro II. cap. 20. de Carævollæ feritate: et Helvetiorum bonam legem apud Simlerum, (Lib. II. pag. 302 *Edit. Elzevir.*) et Elisabethæ reginæ pia mandata apud Camdenum in anno cIɔ Iɔ XCVI.

[3] Locus FLORI ita sese habet: *Verum sciebat victoriam, quæ, salva fide, et integra dignitate, pareretur.* Lib. I. cap. 12. *J. B.*

And if God did and directed thus, the Giver and Lord of life, what should men do, to whom he has given no authority over men, except what is necessary to preserve the safety and society of men?

2 With regard to Children, we are supported by the judgment of the most moral times and peoples. So Camillus, in Livy; Plutarch, who says *there are, among good men, certain laws of war:* where note *apud bonos,* among good men, that you may distinguish those laws from the customary rights of war, which only mean impunity. So Florus: and Livy again.

3 The rule of mercy which obtains always in infants, obtains mostly

ter vindicandum admiserint, aut virilia officia et ipsæ usurpent.
Silv. i. 6. 53. Est enim, ut Statius loquitur, *sexus rudis insciusque ferri.* Neroni hostem vocanti Octaviam in tragœdia reponit præfectus (vers. 864):

[y]Femina hoc nomen capit?

Lib. iv. 11. Alexander apud Curtium: *cum captivis et feminis gerere bellum non soleo: armatus sit oportet, quem oderim.* Gryphus
Lib. xxxix. 3. apud Justinum: *a nullo unquam majorum suorum inter tot domestica et externa bella post victoriam in feminas sævitum, quas sexus ipse et periculis bellorum et sævitiæ victorum eximat.* Apud Tacitum alius: *neque adversus feminas,* [4]*sed palam adversus armatos bellum se tractare.*

Lib. ix. 2. 4 Valerius Maximus Munatii Flacci in infantes et feminas efferatam vocat crudelitatem, et auditu etiam intolerabilem.
Lib. xiii. 57. Apud Diodorum Carthaginienses Selinunte narrantur interfecisse senes, feminas, infantes, *οὐδεμίαν συμπάθειαν λαμβάνοντες, sine humanitatis affectu.*
Lib. xiv. 54. Et alibi hoc ipsum *ὠμότητα*
Pan. Theod. c. 29. *crudelitatem* vocat. Latinus Pacatus de feminis: *sexus, cui*
Theb. v. 258. *bella parcunt.* Simile Papinii de senibus pronuntiatum:

Nullis violabilis armis
Turba senes.

[y] *Femina hoc nomen capit?*] Ideo Tucca et Varus delendos censuere in secunda Æneide versus, ubi deliberat Æneas, an Helenam occidat. [A versu 567. ad 588.]

[4] Est apud TACITUM: *feminas gravidas. Annal.* Lib. I. cap. 59. n. 4. *J. B.*

[z] *Collegio prophetarum*] Hyrcanus Hierosolyma obsidens victimas ad templum misit, narrantibus Hebræis. Sic et Gotthi laudantur Procopio *Gotthicorum* II. (cap. 4) qui sacerdotibus Petri et Pauli extra Romam pepercerunt. Vide additamentum Caroli Magni ad *legem Baioariorum,* (num. 2) et *legem Lango-*

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in Women, (except they have incurred punishment by some special act, or assumed masculine offices). For the sex is unfit for arms: *Does enemy apply to women?* is asked in the tragedy. So Alexander in Curtius; Gryphus in Justin; and another in Tacitus, *neque adversus feminas:* [but it is *feminas gravidas* in the passage. *J. B.*]

4 Valerius speaks of the savage cruelty of Munatius Flaccus to women and children, intolerable to hear of. So the Carthaginians are said to have put to death old men, women, children, *without feeling.* This is *cruelty.* So Pacatus and Papinius.

X. 1 The same rule is to be laid down generally, for Men whose kind of life is repugnant to arms. *Slaughter of men armed and resisting is the law of war,* says Livy; that is, by Natural Law. So Josephus says, that it is reasonable that they who have taken arms should be punished in battle, but that Non-combatants are not to be hurt. So

X. 1 Idem statuendum universaliter de maribus, quorum vitæ genus ab armis abhorret. *Jure belli in armatos repugnantesque cædes,* ut ait Livius, id est, eo jure quod naturæ congruit. Sic Josephus æquum ait, ut in pugna pœnas dent, qui arma ceperunt, insontibus non nocendum. Camillus Veiis expugnatis edixit, ut ab inermi abstineretur. In hac classe primum ponendi sunt hi, qui sacra curant: nam ut hi ab armis abstinerent mos ab antiquo fuit gentium omnium: atque ideo vicissim vi in illos temperabatur. Sic Philisthæi hostes Judæorum non nocebant [z]collegio prophetarum, quod erat Gabæ, ut videre est 1 Sam. x. 5 et 10. Et sic ad alium locum, ubi simile erat collegium tanquam sepositum ab omni armorum injuria, cum Samuele confugit David, 1 Sam. xix. 18. Cretenses, narrat Plutarchus, cum bellis intestinis colliderentur, omnem noxam abstinuisse [a]a sacerdotibus, et iis, quos humandis mortuis præpositos κατακαύτας vocabant. Huc et proverbium illud Græcum pertinet, οὐδὲ πυρφόρος ὑπελείφθη. [b]Notat Strabo, olim cum tota Græcia armis ferveret, Eleos, utpote Jovi sacros, et eorum hospites in alta pace vixisse.

Vict. d. loco. Lib. xxviii. 23. Ant. xii. 3. § 1. Liv. v. 21. Quæst. Gr. 21. p. 296 B. Lib. viii. p. 358.

2 Sacerdotibus merito hac in parte æquantur, qui vitæ genus simile elegerunt, ut monachi et conversi, id est, pœ-

bardicam lib. I. tit. xiv. 14.

[a] *A sacerdotibus*] Servius ad VII. *Æneidos: nam eam defendebat a bello, si non ætas, saltem religio sacerdotis.* [Agitur ibi tantum de immunitate Sacerdotum a militia. *J. B.*]

[b] *Notat Strabo*] Et Polybius libro IV. (cap. 73) et Diodorus Siculus in *excerptis Peirescianis.* (Pag. 225.) Pari modo et qui ad Olympia, Pythia, Nemea, Isthmia certatum ibant, habebant belli tempore ἀσφάλειαν καὶ ἄδειαν, *tutelam ac securitatem.* Docent Thucydides libro V. et VIII. et Plutarchus *Arato.* (pag. 1040 B.)

Camillus, in storming Veii, directed the unarmed to be let alone.

In this class, first we must place Those who perform sacred offices. For that these abstain from arms, is an ancient custom of all nations; and in old time, they were not molested. So the Philistines did not hurt the school of the prophets (1 Sam. x. 5 and 10) at Gaba, where they had a garrison. And so (1 Sam. xix. 18) David and Samuel took refuge at Naioth, where there was also a school of the prophets. Plutarch relates that the Cretans, in their intestine wars, abstained from injuring the priests, and the buriers of the dead. Hence the Greek proverb, *not even the pyre-lighter was left,* when all were killed. Strabo notes that in ancient times, when all Greece was in disturbance with arms, the Eleans, as sacred to Jupiter, and they who were under their hospitality, lived in profound peace.

2 Along with Priests, are properly ranked in this matter, all who

nitentes, quibus proinde æque ut sacerdotibus parci volunt canones naturalem æquitatem secuti. Addas his merito eos, qui studiis literarum honestis et humano generi utilibus operam navant.

C. 2. de treuga et pace.

XI. Deinde agricolas, quos et canones adscribunt. Diodorus Siculus de Indis cum laude refert: ἀμφότεροι γὰρ οἱ πολεμοῦντες ἀλλήλους μὲν ἀποκτείνουσιν ἐν ταῖς μάχαις, τοὺς δὲ περὶ τὴν γεωργίαν ὄντας ἐῶσιν ἀβλαβεῖς, ὡς κοινοὺς ὄντας ἁπάντων εὐεργέτας· *in præliis quidem hostes alii alios interficiunt: at agricolas relinquunt intactos, tanquam in commune utiles.* De antiquis Corinthiis et Megarensibus Plutarchus: τοὺς γεωργοῦντας οὐδεὶς ἠδίκει τὸ παράπαν· *nemo agricolas ullo afficiebat malo.* Et Cyrus regi Assyriorum nuntiari jussit: ὅτι ἕτοιμος εἴη ἐᾶν τοὺς ἐργαζομένους τὴν γῆν, καὶ μὴ ἀδικεῖν· *paratum se eos, qui agros colerent, illæsos indemnesque sinere.* De Belisario Suidas: εἰς δὲ τοὺς

Bibl. ii. 36.

Quæst. Græc. p. 296 B.

Xen. *de Cyri inst.* v. 4. § 12.

Voce Βελισάριος. Ex Procop. *De Bell. Goth.* iii. 1.

[c] *Necessitas perimat*] Gratianus posuit *deprimat.* Plutarchus *Marcello:* Ἐπαμινώνδας καὶ Πελοπίδας οὐδένα πώποτε κρατήσαντες ἀπέκτειναν, οὐδὲ πόλεις ἠνδραποδίσαντο· λέγονται δὲ Θηβαῖοι μηδὲ Ὀρχομενίους ἂν οὕτω μεταχειρίσασθαι παρόντων ἐκείνων. *Epaminondas et Pelopidas nec quenquam interfecere post victoriam, nec civitates in servitutem redegerunt: creduntur que non facturi fuisse Thebani, quod fecere in Orchomenios, si illi adfuissent.* (Pag. 316.) Secutus hoc Marcellus captis Syracusis, ut ibidem ait Plutarchus. Vide eundem Plutarchum *in Catone Uticensi.* (pag. 787 c, d.) *Cabadæ Persarum regi, cum Amida vi cepisset, multaque cædes fieret, senex sacerdos dixit non esse regium jam captos occidere.* Narrat Procopius *Persicorum* i. (cap. 7) qui et *Persicorum* ii. dicit: τὸ ἐπεμβαίνειν τοῖς ἡλωκόσιν οὐχ ὅσιον· *sævire in captos pietati adversatur.* (Cap. 9.) Apud eundem egregia est oratio Belisarii ad milites capta Neapoli, *Gotth.* i. (cap. 9.) Imperator Alexius apud Annam Comnenam, suadenti occidere Scythas captivos: κἂν Σκύθαι, ἀλλὰ πάντως ἄνθρωποι. κἂν ἔχθροι. ἀλλ' ἐλέους ἄξιοι· *etiamsi Scythæ, homines tamen sunt: etiamsi hostes, miseratione tamen digni.* (Lib. viii. c. 4.) Gregoras libro vi. (pag. 92.) τὰ γὰρ ἐν πολέμῳ καὶ μάχῃ γινόμενα ὁποῖα ποτ' ἂν ᾖ, συγγνώμην ἔχει τῷ πεπραχότι, περιστατουμένου τότε τοῦ

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have chosen a similar course of life, as Monks, and Novices, that is, Penitents; and these, the Canons direct, are to be spared, as well as priests; following, in this, natural equity. Add to these, Those who give their labour to honourable literary studies, useful to mankind.

XI. Next add Husbandmen, whom also the Canons include. Diodorus, praising the Indians, says that in their wars, the warriors fight, but they leave the cultivators unmolested, as the common benefactors of both sides. So Plutarch, of the old Corinthians and Megareans. So Cyrus proposed to the king of Assyria. So Belisarius acted, as Suidas says.

ἀγροίκους τοσαύτῃ φειδοῖ τε καὶ προνοίᾳ ἐχρῆτο, ὥστε βιασθῆναι μὲν αὐτῶν οὐδένα πώποτε στρατηγοῦντος Βελισαρίου τετύχηκον· *agricolis ita parcebat, ac tantam pro illis curam gerebat, ut eo duce nulli unquam eorum vis illata fuerit.*

XII. Addit canon mercatores, quod non tantum de his, qui temporariam in hostico moram agitant, intelligendum est, sed et de subditis perpetuis: nam et horum vita ab armis aliena est: ac sub hoc nomine continentur simul alii opifices et artifices, quorum quæstus pacem amat, non bellum.

XIII. 1 Ut ad eos veniamus, qui arma gesserunt, jam ante retulimus dictum Pyrrhi apud Senecam, qui vetari nos ait pudore, id est, æqui respectu, ne capto vitam adimamus. Similem Alexandri sententiam attulimus, quæ cum feminis conjungit captivos. Accedat illud Augustini: *hostem pugnantem* [c]*necessitas perimat, non voluntas. Sicut bellanti et*

Cap. 10. § 1. *hujus Lib.*

Suor. § 10. n. 3.

Ad Bonif. epist. 205.

λογισμοῦ, καὶ τῆς χειρὸς οἱονεὶ μεθυούσης, καὶ λόγον οὐκ ἐχούσης χειραγωγὸν καὶ πρύτανιν τῶν πραττομένων· τῆς δ' ἀκμῆς τῶν δεινῶν πανσαμένης, καὶ καιρὸν ἤδη τῆς προαιρέσεως εἰληφυίας μετὰ στάθμης τινὸς καὶ κρίσεως, τὰς τῶν πράξεων ἀρχὰς παρελέσθαι. τῇ χειρὶ, μοχθηρίαν γνώμης κατηγορεῖ τοῦ πράξαντος, εἴ τι μὴ κατὰ τὸ προσῆκον γίνοιτο· *quæ in præliis actuque belli fiunt: ea, qualiacunque sunt, facienti veniam impetrant, ideo quod tali tempore obsidetur animus ebria manu rationemque non habente ducem ac præsidem actionum. At, ubi periculis suus abscessit vigor, ubi tempus cuncta examinandi ac judicandi accepit liber animus, agendi imperium manui tradere, pravum hominis propositum indicat, si quid indecorum evenerit.* Adde ejusdem Gregoræ locum alterum, quem in his notis posuimus ad finem capitis vii. libri hujus, et de more laudabili Polonorum Chalcocondylam lib. v. Julianus laudatione secunda Constantii, sub cujus persona bonum principem describit: κρατήσας δὲ μετὰ τῶν ὅπλων ἔπαυσε τὸ ξίφος τῶν πόνων, μίασμα κρίνων τὸν οὐκ ἀμυνόμενον ἔτι κτείνειν καὶ ἀναιρεῖν· *armis victor finem imposuit gladii operibus, nefas existimans, homini non ultra se defendenti vitam adimere.* [Legendum, in isto postremo loco, non τὸ ξίφος τῶν πόνων, sed τὸ ξίφος φόνων, ut habet Editio Illustris SPANHEMII, *Orat.* II. pag. 86 c. *J. B.*]

XII. The Canon adds Merchants, which is to be understood, not only of those who make a temporary residence in the hostile country, but also of permanent subjects. For their life also is foreign to arms. And under this name are included Artisans, and Workmen, whose gain requires peace, not war.

XIII. 1 To come to those who have borne arms, we have already quoted the speech of Pyrrhus in Seneca, who says that we are prevented, *pudore*, by decency, from putting a captive to death. We adduced a similar opinion expressed by Alexander, who conjoins captives with women. We may add Augustine, Xenophon, Diodorus Siculus.

resistenti violentia redditur, ita victo vel capto misericordia jam debetur, maxime in quo pacis perturbatio non timetur. Cap. i. § 21. Xenophon de Agesilao: προηγόρευε τοῖς στρατιώταις τοὺς ἁλισκομένους μὴ ὡς ἀδίκους τιμωρεῖσθαι, ἀλλ' ὡς ἀνθρώπους ὄντας φυλάσσειν· *monuit milites, ut captos non tanquam sontes punirent, sed tanquam homines custodirent.* Apud Lib. xiii. 24. Diodorum Siculum est: πάντες ἀντιτείνονται μὲν πρὸς τοὺς ἀντιταττομένους, εἴκουσι δὲ τοῖς ὑποπεπτωκόσι· *omnes* (Græci) *opponunt se repugnantibus, parcunt jam subactis.* Lib. xvii. 13. Eodem judice Macedones, qui sub Alexandro, πικρότερον ἢ πολεμικώτερον προσεφέροντο τοῖς Θηβαίοις, *acerbius egerant cum Thebanis quam belli fas ferebat.*

Cap. 96. 2 Sallustius historia Jugurthina, cum puberes post deditionem interfectos narrasset, factum ait contra jus belli: quod interpretare, contra æqui naturam et morem mitius viventium. Lib. v. 9. Apud Lactantium est: *parcitur victis, et est locus inter arma* Hist. iv. 39. *clementiæ.* Laudat Tacitus Primum Antonium et Varum Flavianos duces, quod in neminem ultra aciem sæviissent. De pace Orat. ii. p. 80 c. Tom. ii. Aristides: ἀνδρῶν γάρ ἐστι καθ' ὑμᾶς τὴν φύσιν, τοὺς μὲν ἀνθεστηκότας κατείργειν τοῖς ὅπλοις· τοὺς δ' ὑποπεσόντας ἠπίως μεταχειρίζεσθαι· *hominum est nostri ingenii, resistentes armis coërcere, prostratos tractare leniter.*

2 Reg. vi. 22. De captivis propheta Elisæus regem Samariæ sic alloquitur: *an quos captivos abduceres, gladio tuo et arcu tuo eos* v. 965. *interimeres?* apud Euripidem in Heraclidis quærenti nuntio,

Hostem perimere vestra lex ergo vetat?

[d] *Captivis parcere*] Capitolinus M. Antonino: *æquitatem etiam circa captos hostes custodivit.* (Cap. 24.)

[e] *Vitam salvam paciscentium, sive in prælio, sive in obsidione, non repudianda deditio*] Romani Persis, qui in arce Petræ erant, apud Procopium, *Gotth.* iv. ὡς ἡμεῖς ὑμᾶς γε καὶ ζυγομαχοῦντας οἰκτείρομεν, καὶ θανατώντων φειδόμεθα, καὶ πρὸς τὸν βίον

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2 When Sallust says, that all the men were slain after the surrender, he adds, *contrary to the Laws of War:* that is, contrary to the manner of humane nations. So Lactantius. So Tacitus of Antonius and Varus. So Aristides.

Elisha the prophet says to the king of Samaria, 2 Kings vi. 22: *Wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow?* So in Euripides. So the Byzantines and Chalcedonians are said to have done acts of extraordinary cruelty, in killing captives. And to spare captives, is a common law. So Seneca, already quoted. And when a general, embarrassed by the number of

Respondet chorus,

Quem Mars reliquit prælio superstitem.

Ibidem Eurystheus captivus: v. 1011.

Quæ me necabunt, non erunt puræ manus.

Apud Diodorum Siculum Byzantii et Chalcedonii, quod captivos satis multos interfecissent, hoc elogio notantur: ἐπετέλησαν πράξεις ὠμότητι διαφερούσας· *perpetrarunt facinora eximiæ crudelitatis.* Idem alibi [d]captivis parcere vocat τὰ κοινὰ νόμιμα, *jus commune:* qui aliter agunt, eos ait extra controversiam peccare. Parcere captivis jubet boni et æqui natura, ut in philosophicis scriptis dicentem Senecam non diu est cum audivimus. Et laudari in historiis eos videmus, qui cum nimia captivorum multitudo oneri aut periculo esse posset, dimittere omnes quam occidere maluerunt. Lib. xii. 82. Lib. xiii. 25, 26. De Clem. i. 18.

XIV. 1 Easdem ob causas [e]vitam salvam paciscentium, sive in prælio, sive in obsidione, non repudianda deditio. Ideo Arrianus in deditos editam a Thebanis stragem, ait fuisse non Græci moris, οὐχ Ἑλληνικὴν σφαγήν. Ac similiter Thucydides libro III. ἑκόντας τε ἐλάβετε, καὶ χεῖρας προϊσχομένους· ὁ δὲ νόμος τοῖς Ἕλλησι μὴ κτείνειν τούτους· *volentes nos et manus tendentes accepistis in potestatem. Mos autem Græcorum est, tales non interficere.* Et apud Diodorum Siculum Syracusani senatores: σώζειν τὸν ἱκέτην, ἄξιον τῆς μεγαλοψυχίας, *magno animo dignum est supplici parcere.* Sopater: νόμος ἐστὶ τοὺς ἱκέτας σώζειν ἐν τοῖς πολέμοις· *moris est, in bellis servare supplices.* De Exped. Alex. i. 9. Cap. 58. Bibl. xi. 91.

2 In obsessis oppidis observatum a Romanis, antequam murum aries percussisset. Cæsar Aduaticis denuntiat, se Lib. ii. de Bell. Gall. c. 32.

ἐνδιαθρυπτομένους τε καὶ βλακεύοντας ἐλεεῖν ἀξιοῦμεν, ὡς Ῥωμαίοις Χριστιανοῖς νόμος· *nos vero vestrum misereri jugum cervice jactantium, mortemque concupiscentibus parcere volumus, et vitam delicate fastidientes servare, ut decet Christianos et Romani imperii cives.* (Cap. 12. *Hist. Miscell.*) Vide Serranum in rebus Francisci I. et Henrici II.

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his captives, dismisses them, he is praised in history.

XIV. 1 Hence surrender on condition of life is accepted, both in a battle and in a siege. Hence Arrian says that the slaughter of the Thebans, who had surrendered, was an *un-Greek* massacre. So Thucydides, *You received us, holding out our hands as surrendering: to kill such is not the Greek custom.* So the Syracusans in Diodorus; and Sopater.

2 In besieging towns, the Romans did this, before the battering-

eorum civitatem conservaturum, si priusquam aries murum attigisset, se dedidissent: qui mos nunc quoque obtinet in locis infirmis, antequam machinæ igniariæ explodantur; in munitio-
Offic. i. 11. ribus, antequam in mœnia impetus fiat. At Cicero non tam quid fiat, quam quid natura æquum sit respiciens, sic ea de re pronuntiat: *et cum iis, quos vi deviceris, consulendum est, tum ii qui armis positis ad Imperatorum fidem confugiunt, quamvis murum aries percusserit, recipiendi.* Notant Hebræi interpretes majoribus suis in more fuisse, [5]ut quam oppugnarent urbem, eam non cingerent corona, sed [f]partem liberam relinquerent effugere volentibus, quo minori sanguine res transiret.

XV. Eadem æquitas jubet parci his, qui sine conditionibus se victori permittunt, aut supplices fiunt. *Trucidare*
Ann. xii. 17. *deditos, sævum,* censente Tacito. Sallustius similiter de
Bell. Jug. c. 96. Campsanis, qui se Mario dediderant, cum puberes interfectos narrasset, addit facinus fuisse contra jus belli, naturale scilicet.
Orat. I. *de rep. ord.* n. 36. *Fragm.* vi. Idem alibi: *non armatos neque in prœlio belli jure, sed postea supplices interfectos.* Et Livio, ut jam diximus, *jure belli*
Lib. xxviii. 23. *in armatos repugnantesque cædes:* et alibi: *qui deditis con-*
Lib. xlii. 21. *tra jus ac fas bellum intulisset.* Imo et in hoc laborandum, ut potius metu ad deditionem cogantur, quam ut interficiantur.
Plut. *in Brut.* p. 996 A. Laudatur id in Bruto, qui adversarios οὐκ εἴασεν ἐμβαλεῖν,

[5] Vide SELDENUM, *De Jure Nat. et Gent. juxta discipl. Hebræor.* Lib. v. cap. 15. *J. B.*

[f] *Partem liberam relinquerent effugere volentibus*] Sic Scipio Æmilianus, cum Carthaginem eversurus esset, edix-

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ram had struck the walls. So Cæsar announces to the Aduatici. And this rule holds at the present day for weak places, before the fire of artillery begins; in strong places, before a storm is ordered. Cicero, looking at equity, says, those who surrender are to be received, even if the ram have struck the wall. The Hebrew commentators note that their countrymen, in their sieges, were wont not to carry the works quite round the city, but to leave an opening for escape, to avoid the shedding of blood.

XV. The same equity commands us to spare those who surrender unconditionally, or ask their lives. *To massacre those who surrender, is savage,* says Tacitus. So Sallust of Marius; and Livy.

And pains are to be taken to make them rather surrender through fear, than be slain. Brutus is praised that he ordered his adversaries to be turned in flank, not charged in front, as being soon his own.

XVI. 1 Exceptions, by no means just, to these precepts of equity

ἀλλὰ περιίππευσεν, φείδεσθαι κελεύων, ὡς μετὰ μικρὸν ἰδίων ἐσομένων· *non passus est impetu oppugnari, sed equitatu circumdedit: parci jubens ut mox suis futuris.*

XVI. 1 Adversus hæc æquitatis ac juris naturalis præcepta exceptiones adferri solent minime justæ, nempe, si talio exigatur, si terrore opus sit, si pertinacius restitum sit. Atqui hæc non sufficere ad justam cædem facile intelliget, qui eorum meminerit, quæ de justis occidendi causis supra sunt prodita. A captivis et deditis aut dedere se cupientibus periculum non est: ut ergo juste occidantur, oportet crimen antecedat, et quidem tale, quod æquus judex morte vindicandum censeret. Atque ita videmus interdum in captos aut deditos sævitum, aut deditionem sub vitæ pacto non acceptam, si qui de injustitia belli convicti, tamen in armis perstitissent; si immanibus convitiis famam hostis lacerassent; si fidem violassent, aut aliud gentium jus, ut legatorum; si transfugæ essent.

Vide Vict. *de jure belli,* n. 49. et 60.

2 At talionem natura non admittit, nisi in ipsos qui deliquerunt: neque sufficit quod hostium unum quasi corpus fictione quadam intelligatur, ut ex iis potest intelligi, quæ de pœnarum communicatione supra a nobis tractata sunt. Apud Aristidem legimus: πῶς οὐκ ἄτοπον κατηγορεῖν μὲν καὶ λέγειν ὡς ἁμαρτήματα συμβαίη, μιμεῖσθαι δ' ἀξιοῦν ὡς ὀρθῶς ἔχοντα; *nonne absurdum, ea quæ accuses et prave facta*

Lib. ii. 21. § 18.

De pace, ii. p. 75 c. Tom. II.

it: *fugerent, qui vellent.* Polybius. [Nihil tale reperio apud POLYBIUM; et vereor ut memoria Auctorem nostrum fefellerit. *J. B.*]

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and natural justice are often alleged:—Retaliation:—the necessity of striking terror:—the obstinacy of the resistance. It is easily seen that these are insufficient arguments. There is no danger from captives or persons willing to surrender; and therefore, to justify putting them to death, there should be antecedent crime, of a capital amount. And when this can be urged, surrender on condition of life is sometimes not accepted; or they are put to death after surrender: for instance, those who, though convinced of the injustice of the war, remained in arms; or attacked the reputation of their enemies with monstrous calumnies; or violated faith; or other laws, such as the rights of legation; or were deserters.

2 But as to Retaliation, nature does not allow it, except against the offender himself. Nor is it sufficient, that the enemy is, by a sort of fiction, conceived as forming one body; as appears from what we have said above of the punishment of accessories. Aristides speaks of *blaming what others do, and yet imitating it.* Plutarch accuses

dicas, tanquam recta velle imitari? Accusat Syracusanos hoc nomine Plutarchus, quod Hicetæ uxores ac liberos occiderint, ideo tantum, quod Hicetas Dionis uxorem, sororem et filium interfecisset.

Plut. *Tim.* p. 252 C. *et Dion.* p. 933 E.

3 Utilitas etiam, quæ ex terrore in posterum speratur, ad jus dandum cædis non pertinet; sed, si subsit jus, potest inter causas esse, ob quas jus non remittatur.

4 Obstinatius autem studium in suas partes, si modo causa earum non sit omnino inhonesta, supplicium non meretur, ut apud Procopium disserunt Neapolitani: aut, si qua ejus pœna est, non debet ad mortem pervenire: neque enim id statueret æquus judex. Alexander, cum in oppido quodam, quod acrius restiterat, puberes omnes jussisset interfici, visus est Indis bellare latronum more, eamque famam reveritus rex victoria clementius uti cœpit. Melius idem Milesiis quibusdam parci voluit, ὅτι γενναῖοί τε καὶ πιστοὶ αὐτῷ ἐφαίνοντο, *quod eos videret generosos ac suis fidos esse*, quæ Arriani verba sunt. Phyto Reginorum prætor, cum ob pertinacius defensam urbem a Dionysio ad cruciatus et mortem raperetur, exclamavit, eo quod urbem noluisset prodere, supplicio se affici, cujus ultionem Deus brevi esset exacturus. Diodorus Siculus pœnas has iniquas, ἐκνόμους τιμωρίας vocat. Valde mihi placet votum quod est apud Lucanum:

Lib. i. *Goth.* c. 10.

Polyæn. iv. 3. n. 30.

De Exped. Alex. i. 20.

Bibl. Hist. xiv. 113.

Phars. vii. 312. *et seqq.*

[f] Videtur heic excidisse vox *civitatis*, aut similis. Adcurate enim loquendo, non *regio*, sed *civitas*, aut *societas*, dici potest *constare ex humano genere*. *J. B.*

[g] *Facinusque animo versabat iniquum*] Crudele hoc visum sæculis posterioribus notat ad x. *Æneidos* Servius (ad vers. 519.)

[h] *Turba peccantum*] *Quicquid multis peccatur, inultum est.* Scholiastes Ju-

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the Syracusans on this ground, as having put to death the wives and children of Hicetas, because he had killed the wife, sister, and son of Dion.

3 The advantage which is expected by striking terror, cannot give a right to kill men: but if we have a right, it may be a reason for not remitting it.

4 An obstinate adherence to one's own party, if their cause be not indecently bad, does not deserve punishment: [so in Procopius:] or at least, not a punishment extending to death; for no impartial judge would so decide. When Alexander ordered the men to be put to death, in a town which had resisted obstinately, the Indians thought him a ruffian; and he, in fear of such a reputation, afterwards used his victory more temperately. To the Milesians he was more generous, sparing them for their fidelity to their friends. When Phyto the

Vincat, quicunque necesse
Non putat in victos sævum distringere ferrum,
Quique suos cives, quod signa adversa tulerunt,
Non credit fecisse nefas.

Dum tamen civium nomine intelligamus non hujus aut illius regionis, sed communis illius [6]ex humano genere constantis cives.

5 Multo vero minus cædem justam facit dolor ex accepta clade, sicut Achillem, Æneam, Alexandrum amicis suis sanguine captorum aut se dedentium parentasse legimus. Itaque Homerus merito illud accinit: *Iliad.* xxiii. 24, 176.

Κακα δὲ φρεσὶ μήδετο ἔργα.

[g]Facinusque animo versabat iniquum.

XVII. Sed et ubi delicta sunt talia, ut morte digna videri possint, misericordiæ erit, ob multitudinem eorum aliquid decedere de summo jure: cujus clementiæ auctorem ipsum habemus Deum, qui Cananæis eorumque vicinis populis longe flagitiosissimis pacem offerri voluit, quæ vitam ipsis sub tributaria conditione concederet. Pertinet huc Senecæ dictum: *in singulos severitas Imperatoris distringitur: at necessaria est venia, ubi totus deseruit exercitus. Quid tollit iram sapientis? [h]turba peccantum.* Et Lucani illud: *De Ira* ii. 10. *Phars.* ii. v. 198, *et seqq.*

venalis ex Lucano. [ubi legitur, Lib. v. vers. 260.] Livia apud Xiphilinum ex Dione: ἄν τε τις πάντα ἁπλῶς τὰ τοιαῦτα κατὰ τὴν ἀξίαν κολάζῃ, λήσει τοὺς πλείους τῶν ἀνθρώπων ἀπολέσας· *si quis talia omnia rigore punire velit, non videt eo se ferri, ut maximam hominum partem interimat.* (Pag. 87. *Ed. R. Stephan.*) Augustinus *Epistola* LXIV. *Magis monendo, quam minando.*

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governor of Rhegium was led to death with torture by Dionysius, for defending his city obstinately, he exclaimed that the gods would revenge his case; his unjust punishment, as Diodorus calls it. Cæsar, in Lucan, wishes well to him who can think that his citizens have done well, though they carried arms against him; which I admire, including, in *citizens,* the citizens, not of one nation, but of all.

5 Still less is such killing justified by grief for calamity suffered; as when we read that Achilles, Æneas, Alexander, marked the funerals of their friends with the blood of captives, or persons who had surrendered. Homer calls such a purpose *κακὰ ἔργα, evil deeds.*

XVII. Even when the offenses are such that they may seem to deserve death, it is the office of mercy to remit the extreme of right, on account of the number of offenders. We find an example of this clemency in God himself, who allowed that the Canaanites and their neighbours should have the offer of peace, on condition of tribute. So

Tot simul infesto juvenes occumbere letho
Sæpe fames pelagique furor, subitæque ruinæ,
Aut cœli terræque lues, aut bellica clades,
Nunquam pœna fuit.

Ne nimium multi pœnam subirent, sortitio comparata est, inquit Cicero. Sallustius ad Cæsarem: *neque quisquam te ad crudeles pœnas aut acerba judicia invocat, quibus civitas magis vastatur quam corrigitur.*

Pro Cluent. c. 46.
Orat. i. *de Rep. Ord.* c. 40. Lib. vi. *Fragm.*

XVIII. 1 De obsidibus quid ex jure naturæ statuendum sit, accipi potest ex iis, quæ in superioribus dicta a nobis sunt. Olim cum vulgo crederetur quisque in vitam suam id juris habere, quod in res alias, quæ in proprietatem veniunt, atque id jus consensu aut tacito aut expresso a singulis pervenisse ad civitatem, minus mirandum est, si obsides privatim innoxios ob peccatum civitatis morte affectos legamus, sive tanquam ex suo peculiari consensu, sive tanquam ex publico, cui et suus includeretur. At, postquam verior sapientia nos docuit dominium in vitam Deo exceptum, sequitur, ut solo consensu nemo jus cuipiam dare possit in vitam aut suam, aut civis sui. Atque ideo Narseti bono duci atrox visum de innoxiis obsidibus supplicium sumere narrat Agathias: de aliis alii: etiam Scipionis exemplo, qui aiebat, se non in obsides innoxios, [1]sed in ipsos

Vict. *de jure belli*, n. 43.
Lib. i. 7.
Liv. xxviii. 34.

Sic enim agendum est cum multitudine peccantium; severitas autem exercenda est in peccata paucorum. (Epist. XXII. *§ 5. divis. Benedictin. Edit.)* Adde Gailium *de Pace Publica,* Lib. II. cap. ix. 37.

[1] *Sed in ipsos qui defecissent sævituram*] Idem ait Julianus apud Euna-

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Seneca, *Pardon is necessary, when the whole army has deserted. What takes away the wise man's anger? the offenders' number.* So Lucan. Cicero speaks of lot in such a case. So Sallust to Cæsar.

XVIII. 1 What is to be the rule of hostages, we have already suggested. Formerly, when it was believed that every one had a right over his own life, and that he had transferred this to the state, it is not so surprizing, if we find hostages, without any private crime, put to death, for the fault of their city; either as by their own consent, or by the public consent, in which their own was included. But when a better wisdom has taught us that our life is not put in our power by God, it follows that no one can by mere consent give a right over his own life, or that of his fellow-citizen. And so Narses thought it atrocious to punish innocent hostages: and Scipio said he would not punish the hostages, but the offenders: not the unarmed, but the armed.

2 What is said by recent writers, that such conventions are valid if

qui defecissent sæviturum: nec ab inermi, sed ab armato hoste pœnas expetiturum.

2 Quod autem ex recentioribus jurisconsultis non ignobiles, conventiones tales valere dicunt si moribus firmentur, accipio, si jus vocant solam impunitatem, quæ in hoc argumento sæpe venit sub tali nomine: sin a peccato immunes putant, qui ex conventione sola vitam adimunt alicui, vereor, ne et fallantur ipsi, et periculosa auctoritate alios fallant. Plane si qui obses venit, est aut ante fuit in numero graviter delinquentium, aut postea fidem a se datam in re magna fefellit, fieri potest, ut supplicium injuria vacet. Menoch. *Arb.* q. 7.

3 At Clœliæ, quæ [k]non sua sponte, sed civitatis jussu obses venerat, cum tranato Tyberi effugisset, *apud regem Etruscum non tuta solum, sed et honorata virtus fuit,* quæ Livii in hac re enarranda verba sunt. Lib. ii. 13.

XIX. Illud adhuc addendum est, omnes commissiones, quæ ad jus consequendum aut bellum finiendum nullius sunt usus, sed meram habent virium ostentationem propositam, id est, ut Græci loquuntur, *ἐπίδειξιν ῥώμης μᾶλλον ἢ πρὸς πολεμίους ἀγῶνα*, et cum officio Christiani hominis et cum ipsa humanitate pugnare. Itaque serio hæc vetare debent rectores, inutiliter fusi sanguinis rationem ei reddituri, cujus vice gla- Arr. Lib. i.

pium *Excerpto Legationum* i. pag. 9. *Ed. Hœsch.*

[k] *Non sua sponte*] Confer historiam obsidum id onus detrectantium et ob id punitorum, apud Nicetam libro ii. (in *Vit. Isac. Ang.* c. 7.)

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authorized by custom, I allow, if they mean that they obtain impunity, which often passes for right; but if they mean that *they* are free from sin, who take away life on a mere convention, I am afraid they are both wrong themselves, and mislead others. If, however, a person who comes as a hostage, is or has been a grave criminal, or grievously violates his faith given, it may be that the punishment may be right.

3 But Clelia, who was sent as a hostage, not by her own consent but by command of the city, and who escaped by swimming the Tiber, was praised by the Etruscan king, as Livy says.

XIX. We must add, that all combats by challenge, which are of no use in obtaining rights, or in ending the war, but are merely for the sake of shewing valour or skill, are at variance with Christian duty and with humanity. Rulers ought decisively to forbid such, since they must render an account to him, in whose stead they bear the sword, of blood shed uselessly. So Sallust praises leaders who con-

dium gestant. Quippe et [7]Sallustio laudati duces, qui incruento exercitu victoriam deportarent. Et de Cattis notæ
Germ. c. 30. virtutis populo Tacitus: [1]*rari excursus et fortuitæ pugnæ.*

[7] Apud Servium, in *Æn.* xi. Vide *Fragmenta* Sallustii, Lib. vi. cap. 25. pag. 102. *Ed. Wass. J. B.*

[1] *Rari excursus et fortuitæ pugnæ*] Demetrium reprehendit Plutarchus: *φιλονεικίας ἕνεκα μᾶλλον ἢ χρείας μάχεσθαι καὶ κινδυνεύειν τοὺς στρατιώτας ἀναγκάζοντος· quod gloriæ magis studio quam ex utilitate milites in pericula truderet, prœliisque objiceret.* (Pag. 908 c.)

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quer bloodlessly. So the Catti, a people of known valour, are praised by Tacitus, because, *with them, champions stepping out of the ranks, and chance fights, are rare.*

CAPUT XII.

TEMPERAMENTUM CIRCA VASTATIONEM ET SIMILIA.

I. *Quæ vastatio justa sit et quatenus.*
II. *Abstinendum a vastatione, si res nobis fructuosa sit et extra hostis potestatem.*
III. *Si magna sit spes celeris victoriæ:*
IV. *Si hostis habeat aliunde quo se sustentet:*
V. *Si res ipsa ad bellum fovendum nullius sit usus.*
VI. *Hoc maxime locum habere in his quæ sacra sunt aut sacris accedunt:*
VII. *Item religiosis:*
VIII. *Utilitates, quæ ex tali moderatione sequuntur, annotatæ.*

I. 1 RES alterius ut perdere quis sine injuria possit, horum trium unum antecedat necesse est: aut necessitas talis, quæ in primi dominii institutione excepta debeat intelligi; ut si quis tertii gladium, quo usurus sit furiosus, periculi sui evitandi causa in amnem projiciat, quo ipso tamen casu manere obligationem damni resarciendi ex veriore sententia alibi dixi- Lib. ii. 11. § 9. mus: aut debitum aliquod procedens ex inæqualitate, nimirum ut res perdita imputetur in illud debitum quasi percepta, alioqui enim jus non esset: aut meritum aliquod malum, cui pœna talis par sit, aut cujus mensuram pœna non excedat: nam, ut recte notat sani judicii theologus, ut propter pecora Vict. *de jure belli*, n. 52. et 56. abacta aut domos aliquas incensas totum regnum vastetur, æquitas non fert: quod et Polybius vidit, qui in bello non in Lib. v. 11.

CHAPTER XII. *Restraints as to Wasting, and the like.*

I. 1 In order that any one may destroy the property of another without wrong, one of these three things is necessary:—either such a necessity as must be supposed to be accepted in the first institution of property: (as if any one, to save himself, threw into the river the sword of another, which a madman was going to use; in which case, however, the better opinion is, that the obligation of restitution remains:)—or some debt remaining unpaid, in which case the thing destroyed is to be reckoned as received, otherwise the right does not exist:—or some ill desert, to which such punishment is suited, and so that the loss does not exceed the desert: for, as a sound theologian rightly notes, it is not equitable that for some cattle driven away, or some houses burnt, a kingdom should be laid waste; as Polybius also said; who would not allow that in war punishment should go on to an indefinite extent, but only so far that the offenses may be equitably

infinitum vult vagari pœnam, sed usque eo, ut delicta æquo modo expientur. Et hæ quidem causæ et intra hos duntaxat fines faciunt ut absit injuria.

2 Ceterum, nisi causa utilitatis suadeat, stultum sit, nullo suo bono nocere alteri. Ideo, qui sapiunt, utilitatibus moveri
Strat. c. 6. solent, quarum præcipua est illa, quam annotavit Onosander: *τὴν γῆν τῶν πολεμίων φθειρέτω καὶ καιέτω καὶ τεμνέτω. ζημία γὰρ χρημάτων καὶ καρπῶν ἔνδεια μειοῖ πόλεμον, ὥσπερ ἡ οὐσία τρέφει. Hostium terram perdere, urere, populari meminerit. Nam et* [a]*pecuniarum et frugum penuria bellum minuit, quantum auget copia:* a quo non discrepat illud
In Plat *de Republ.* p. 89. Procli: *στρατηγικὸν τὸ τῶν ἀγωνιστῶν περικόπτειν τὴν εὐπορίαν, boni est Imperatoris hostium copias undique acci-*
Lib. iv. 9. n. 8. *dere.* De Dario Curtius: *credebat inopia debellari posse nihil habentem nisi quod rapiendo occupasset.*

[a] *Pecuniarum et frugum penuria bellum minuit*] Philo *de Vita Contemplativa*: *οἱ πολέμιοι κείρουσιν ἢ δενδροτομοῦσι τὴν τῶν ἀντιπάλων χώραν, ἵνα σπάνει τῶν ἀναγκαίων πιεσθέντες ἐνδῶσι· solent hostes vastare et arboribus nudare terram hostilem, ut hostes eo facilius se dedant rerum necessariarum penuria.* (Pag. 891 D.) Idem in Diris: *διττὰν ἐργαζόμενοι συμφορὰν, λιμὸν μὲν φίλοις, ἐχθροῖς δὲ περιουσίαν· duplex sibi malum acquirunt, inopiam amicis, copiam hostibus.* (Pag. 930 A. init. lib.)

[b] *Philo*] Alter ejusdem scriptoris locus de humanitate dignus et ipse qui huc transscribatur: *ἐπιδαψιλευόμενος τὸ ἐπιεικὲς, πάλιν πλουσίως αὐτῷ καὶ κατακόρως χρῆται, μετιὼν ἀπὸ μὲν τῶν λογικῶν ἐπὶ τὰ ἄλογα, ἀπὸ δὲ τῶν ἀλόγων ἐπὶ τὰ φυτὰ, περὶ ὧν αὐτίκα λεκτέον, ἐπειδήγε περὶ τῶν πρότερον ἀνθρώπων, καὶ τῶν ὅσα ψυχῆς μεμοίραται, λέλεκται. ἀπείρηκε τοίνυν ἄντικρυς μήτε δενδροτομεῖν ὅσα τῆς ἡμέρου ὕλης, μήτε κείρειν ἐπὶ λύμῃ σταχυοφοροῦσαν πρὸ καιροῦ πεδίαδα, μήτε συνόλως καρπὸν διαφθείρειν, ἵνα περιουσίᾳ μὲν τροφῶν ἀφθόνων χορηγῆται τὸ τῶν ἀνθρώπων γένος, περιουσιάζῃ δὲ μὴ μόνον τῶν ἀναγκαίων, ἀλλὰ καὶ τῶν πρὸς τὸν ἁβροδίαιτον βίον. ἀναγκαίον μὲν γὰρ ὁ τοῦ σίτου καρπὸς εἰς τροφὴν ἀνθρώπων ἀποκριθείς· πρὸς δὲ τὴν ἁβροδίαιτον βίον, αἱ τῶν ἀκροδρύων ἀμύθητοι ποικιλίαι. γίνονται δὲ*

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expiated. And for these causes, and within these limits, to damage another's property is not to do a wrong.

2 But except there be some motive of utility, it is foolish, for no good of your own, to harm another. Therefore wise men are commonly moved by their advantages, of which the principal is, that which Onosander notes: *Let the general waste, burn, and ravage the enemy's country; for the want of money and provision breaks down a war as abundance holds it up.* And so Proclus, *It is the part of a good general to cut off the enemy's resources.* So Curtius, of Darius.

3 Such ravage is tolerable (to the moralist) as in a short time reduces the enemy to seek peace: which was the kind of war that

3 Et illa quidem populatio ferenda est, quæ brevi ad pacem petendam hostem subigit: quo genere belli usus Halyattes (Herod. i. 17.) in Milesios, Thraces in Byzantios, Romani in Campanos, Capenates, Hispanos, Ligures, Nervios, Menapios. (Polyb. iv. 45. Front. *Strat.* iii. 4. n. 1. Liv. v. 12. *Idem*, xxxiv. 17; xl. 39. Cæsar. *de Bell. Gall.* vi. 3. 6.) At, si recte rem expendas, plerumque admittuntur talia odio magis quam prudenti ratione. Ferme enim evenit, ut aut causæ illæ suadentes cessent, aut ut aliæ sint validiores, quæ dissuadeant.

II. 1 Id eveniet primum, si nos ipsi rem frugiferam ita teneamus, ut hostibus non possit esse in fructu. Quo proprie spectat lex divina, quæ in vallum bellique opera vult impendi (*Deut.* xx. 19, 20.) arbores feras, frugiferas vero asservari ad victum, addita causa, quod non ut homines, ita et arbores adversum nos in prælium consurgere possint: quod ex rationis similitudine [b]Philo etiam ad agros frugiferos producit, legi hæc verba affingens: (*De cr. magist.* p. 734 c.) *quid rebus inanimis quæ et mites sunt et mites*

ἐν ἐνδείαις πολλάκις ὅτε καὶ τροφαὶ δεύτεραι. καὶ προσυπερβάλλων, οὔτε τῶν πολεμίων χώραν τέμνειν ἐᾷ, παραγγέλλει δὲ ἀπέχειν δενδροτομιῶν, ἄδικον ὑπολαμβάνων τὴν πρὸς ἀνθρώπους ὀργὴν ἀποσκήπτειν εἰς τὰ μηδενὸς αἴτια κακοῦ. ἔπειτα δὲ ἀξιοῖ μὴ μόνον τὸ παρὸν προορᾶσθαι, μηδενὸς ἐν ὁμοίῳ μένοντος, ἀλλὰ πάντων τροπαῖς καὶ μεταβολαῖς χρωμένων, ὡς εἰκὸς εἶναι τοὺς τέως δυσμενεῖς ἐπικηρυκευσαμένους καὶ συμβατηρίων ἄρξαντας, ἐνσπόνδους αὐτίκα γενέσθαι. φίλους δὲ τροφῶν ἀναγκαίων ἀποστερεῖν χαλεπὸν, μηδὲν ταμιευσαμένους τῶν ἐπ' ὠφελείᾳ, διὰ τὴν τοῦ μέλλοντος ἀδηλότητα. πάνυ γὰρ ἐκεῖνο καλῶς εἴρηται τοῖς παλαιοῖς, ὅτι καὶ φιλίας κοινωνητέον, μὴ ἀπογινώσκοντας ἔχθραν, καὶ προσκρουστέον ὡς φιλίας ἐσομένης, ἵνα ἕκαστος ἐν τῇ ἑαυτοῦ φύσει ταμιεύηταί τι τῶν εἰς ἀσφάλειαν, καὶ μὴ ἀπογυμνωθεὶς ἐν ἔργοις καὶ λόγοις, μετανοῇ τῆς ἄγαν εὐχερείας, ὅτ' οὐδὲν ὄφελος, αἰτιώμενος ἑαυτόν. τὸ λόγιον τοῦτο χρὴ φυλάττειν καὶ τὰς πόλεις, ἐν μὲν εἰρήνῃ προνοουμένας τῶν κατὰ πόλεμον, ἐν δὲ πολέμῳ τῶν κατ' εἰρήνην, καὶ μήτε τοῖς συμμάχοις ἀνέδην προσπιστεύειν, ὡς οὐ χρησομένοις μεταβόλῃ πρὸς τὸ ἀντίπαλον, μήτε τοῖς πολεμίοις εἰσάπαν ἀπιστεῖν, ὡς οὐ δυναμένοις ποτε μεθαρμόσασθαι πρὸς τὸ ἔνσπονδον. εἰ μέντοι καὶ μηδὲν ὑπὲρ ἔχθρου πρακτέον δι' ἐλπίδα καταλλαγῶν, οὐδὲν ἐχθρὸν φυτὸν, ἀλλὰ πάντα

Halyattes carried on against the Milesians, the Thracians against the Byzantines, the Romans against the Campanians, Capenates, Spaniards, Ligurians, Nervians, Menapians. But if you weigh the matter well, you will find that such practices are admitted, rather through spite than prudence. For it generally happens, either that these motives cease, or that other motives which act the other way are more powerful.

II. 1 That will be the case, in the first place, if we are in possession of the country which yields provisions, so that it cannot avail the enemy for their supply. And to this point properly tends the divine law (Deut. xx. 19, 20), which forbids the cutting down fruit-trees for bulwarks and other warlike uses, and points out trees which do not

fructus ferunt irasceris? an vero in morem hominum qui hostes sunt, inimicitiæ significationem arbores produnt, ut pro his quæ faciunt aut facere minantur stirpitus evellendæ sint? quin prosunt victoribus, præbentque copiam rerum quas necessitas exigit, imo et ad voluptatem; non soli homines tributa ferunt, sed meliora arbores statis temporibus, ac talia ut sine iis vivere non detur. Josephus vero ad eundem locum, si vocem edere possent arbores clamaturas ait, inique se cum belli causæ non sint perferre belli pœnas. Neque aliunde, ni fallor, originem habet illud Pythagoricum apud Jamblichum: *ἥμερον φυτὸν καὶ ἔγκαρπον μήτε βλάπτειν,*

Ant. Jud. iv. 8. p. 130 B.

De Vit. Pyth. xxi. § 99.

ἔνσπονδα καὶ ὠφέλιμα· τὰ δ' ἥμερα καὶ διαφερόντως ἀναγκαῖα, ὧν ὁ καρπὸς ἢ τροφή ἐστιν, ἢ ἰσότιμον τροφῇ κτῆμα. οὐ δεῖ πολεμεῖν πρὸς τὰ μὴ πολέμια, τέμνοντας ἢ καίοντας ἢ ῥίζαις αὐταῖς ἀνασπῶντας, ἅπερ αὐτὴ ἡ φύσις ὑδάτων ἐπιῤῥοίαις καὶ θέρους εὐκρασίαις ἐτελειογόνησε, δασμοὺς ἐτησίους οἴσοντα ἀνθρωποῖς οἷα βασιλεῦσιν. ἐμέλησε δ' αὐτῷ καθάπερ ἀγαθῷ προστάτῃ ἄληπτον εἶναι μὴ μόνον ζώοις, ἀλλὰ καὶ φυτοῖς ἰσχύν τε καὶ ῥώμην, καὶ μάλιστα τοῖς ἡμέροις, ἐπειδὴ καὶ πλείονος ἄξια φροντίδος ἐστὶ, καὶ οὐχ ὁμοίως τοῖς ἀγρίοις ἔγγονα, γεωργικῆς ἐπιστήμης δεόμενα πρὸς κραταιοτέραν δύναμιν· Æquitatem suam etiam largius dispensans Moses, valde ea ubertim ac liberaliter utitur, descendens a ratione utentibus ad muta animantia, ab his vero ad ea, quæ e terra nascuntur, de quibus nunc dicendum est, quando de hominibus ut præstantissimis, et aliis, quæ animam sentientem nacta sunt, jam egimus. Diserte itaque vetuit aut exscindere arbores mites, aut exitialiter ante tempus demetere frugiferas terras, aut ullos omnino fructus corrumpere, ut abundantia alimentorum instruatur humanum genus: abundent autem non modo necessaria, sed et quæ ad vitam delicatiorem faciunt. Necessariæ enim fruges, ad homines nutriendos seposita res: ad delicias vero omnium de arboribus nascentium varietas: quæ sæpe, ubi alia deficiunt, succedunt in alimentorum locum. Ultra procedens, terram etiam hostilem vastari non sinit: præcipue vero excidiis arborum abstineri jubet, iniquum existimans, iram in homines conceptam erogari in ea, quæ causa mali nullius sunt. Hoc ipso et illud docet, non præsens tempus spectare tantum, cum nihil in suo statu maneat, sed cuncta vicibus ac mutationibus subjecta sint, ita ut facile sit eos qui nunc sunt hostes, ubi ad colloquia et pacta ventum erit, rursum fœderatos fieri. At amicos necessariis fraudare durum, quibus ob futurum incertum etiam asservari debuerant, quæ usui esse

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supply food, as proper to be used for such purposes; and adds the reason that "the tree of the field is man's life," and that they cannot war against man, as man can. And this Philo extends to fields which have fruit; adding, that they minister food and comfort to the victors: they pay tribute. Josephus adds, on the same place, that if the trees could speak they would complain of the injustice of their bearing the penalty of the war, of which they are not the cause. And on the same ground rests the Pythagorean dictum in Jamblichus, that it is unlawful to hurt a fruit-bearing tree.

2 Porphyry, in his book Against Eating Animals, speaking of the

μήτε φθείρειν· *mansuetam frugiferamque arborem nec lædere nec exscindere fas esto.*

2 [c]Porphyrius vero mores Judaicos describens libro de non edendis animalibus quarto, legem hanc, consuetudine ut puto interprete, etiam ad animantia ruris operi inservientia producit: nam his quoque ut in bello parceretur a Mose præceptum ait: Thalmudica vero scripta et Hebræi interpretes addunt, [d]legem hanc porrigendam ad rem quamvis quæ sine causa peritura sit, ut si ædificia comburantur, esculenta ac potulenta corrumpantur. Consentit cum hac lege ducis Atheniensis Timothei prudens moderatio, qui narrante Polyæno, οὐκ ἐπέτρεπεν οὔτε οἰκίαν οὔτε ἔπαυλιν καθαιρεῖν, οὐ μὴν οὐδὲ *Strat.* iii. 10. n. 5.

possunt. Verissime enim dictum antiquis, ita amicis utendum, ut non putentur nullæ supervenire posse inimicitiæ, et ita tractandas offensas, ut amicitia speretur, nimirum ut quisque intra animum aliquid recondat, quo tutus sit, et non eo nimium nudato per verba et facta mox pœnitentiam agat nimiæ suæ vehementiæ; seque accuset, ubi res sanari amplius non potest, oraculum hoc et civitatibus observandum est, ut pacis tempore parent, quæ ad bellum sunt opus, in bello vero, quæ ad pacem: ac neque amicis supra modum fidant: tanquam qui non possunt in contrarium verti; neque hostibus ita diffidant, quasi nunquam possint ad amicitiam reduci. Quod si etiam pro hoste nihil faciendum esset in spem conciliationis, certe nihil eorum, quæ terra fert, hostile: quin amica omnia, utilia omnia: mitissima vero vel maxime necessaria, ut quorum fructus aut alimentum sint, aut par aliquid alimento. Non oportet bellum inferre belli nesciis, non secare, non urere, non exstirpare radicitus, quæ natura aquarum irrigationibus et æstatum sereno tenere educavit, ut tributa hominibus velut regibus ferrent. Cura autem ei ut communi rerum omnium et optimo præsidi fuit, illæsam præstare non animantibus tantum sed et terræ fœtibus vim ac robur, præsertim vero mitibus, quia majoris tutelæ indigent, nec ad sylvestrium morem fœcunda sunt, sed peritam culturam desiderant, ut firmitatem consequantur. (Pag. 712, 713. *Edit. Paris.*)

[c] *Porphyrius vero*] Verba ejus sunt: φείδεσθαι δὲ κελεύει κἂν τῇ πολεμίᾳ τῶν συνεργαζομένων ζώων καὶ μὴ φονεύειν· *parci etiam jubet lex in terra quamvis hostili animantibus operum sociis, ita ut ea occidere non liceat.* (Pag. 394. *Edit. Lugd.* 1620.)

[d] *Legem hanc porrigendam*] Contra vero restringendam, addita exceptione, nisi arbores in suburbanis locis impediant jaculatores. [Vide SELDEN. *de Jure Nat. et Gent.* Lib. VI. c. 15. *J. B.*]

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manners of the Jews, being guided, as I conceive, by custom, extends this to animals used in agriculture: for he says that Moses commanded to spare these also. And the writers of the Talmud, and the Hebrew Commentators, say that this law is to be extended to anything which is destroyed without cause, as when buildings are burnt, or victuals spoiled. And with this law, agrees the prudent moderation of Timotheus, the Athenian general, who *did not allow a house or city to be burnt, or a fruit-tree to be cut down,* as Polyænus relates. In Plato's *Laws* we have this, that *the land is not to be ravaged nor houses burnt.*

ἥμερον δένδρον ἐκκόπτειν· *non patiebatur aut domum, aut villam dirui, aut arborem frugiferam exscindi.* Exstat et lex Platonis *de Republica* quinto: μήτε γῆν τέμνειν, μήτε οἰκίαν ἐμπιπράναι, *ne terra vastetur, ne domus incendantur.*

Pag. 470, 471. Tom. II.

3 Multo vero magis hoc locum habebit post plenam victoriam. Corinthum excisam non probat Cicero: ubi tamen fœde tractati erant Romanorum legati: idemque alibi horrificum, nefarium, omni imbutum odio dicit bellum, quod parietibus, tectis, columnis, postibus fit. Laudat Livius Romanorum lenitatem victa Capua, quod non sævitum sit incendiis ruinisque [e]in tecta innoxia murosque. Agamemnon apud Senecam:

Offic. i. 11. *Pro domo sua ad Pont.* c. 23. Lib. xxvi. 16. *Troad.* v. 286, *et seqq.*

Equidem fatebor (pace dixisse hoc tua
Argiva tellus liceat) affligi Phrygas,

[e] *In tecta innoxia murosque*] Egregia est hujus argumenti epistola Belisarii *ad Totilam* apud Procopium *Gothicorum* III. πρότερον μὲν κάλλη οὐκ ὄντα ἐργάζεσθαι, ἀνθρώπων ἂν φρονίμων εὑρήματα εἶεν καὶ πολιτικῶς βιοτεύειν ἐπισταμένων. ὄντα δὲ ἀφανίζειν τῶν γε ἀξυνέτων εἰκὼν, καὶ γνώρισμα τοῦτο τῆς αὐτῶν φύσεως οὐκ αἰσχυνομένων χρόνῳ τῷ ὑστέρῳ ἀπολιπεῖν. Ῥώμη μέν τοι πόλεων ἁπασῶν, ὅσαι ὑφ' ἡλίῳ τυγχάνουσι οὖσαι, μεγίστη τε καὶ ἀξιολογωτάτη ὡμολόγηται εἶναι. οὐδὲ γὰρ ἀνδρὸς ἑνὸς ἀρετῇ εἴργασται, οὐδὲ χρόνου βραχέος δυνάμει εἰς τόσον μεγέθους τε καὶ κάλλους ἀφῖκται. ἀλλὰ βασιλέων μὲν πλῆθος, ἀνδρῶν δὲ ἀρίστων ξυμμορίαι πολλαὶ, χρόνου τε μῆκος καὶ πλούτου ἐξουσίας ὑπερβολὴ, τάτε ἄλλα πάντα ἐκ πάσης τῆς γῆς, καὶ τεχνίτας ἀνθρώπους ἐνταῦθα ξυναγαγεῖν ἴσχυσαν· οὕτω τε τὴν πόλιν τοιαύτην, οἱανπὲρ ὁρᾷς, κατὰ βραχὺ τεκτηνάμενοι, μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις ἀπέλιπον. ὥστε ἡ εἰς ταῦτα ἐπήρεια, εἰκότως ἂν ἀδίκημα μέγα εἰς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος δόξειεν εἶναι. ἀφαιρεῖται γὰρ τοὺς μὲν πρόγεγενημένους τὴν τῆς ἀρετῆς μνήμην, τοὺς δὲ ὕστερον ἐπιγενησομένους τῶν ἔργων τὴν θέαν. τούτων δὲ τοιούτων ὄντων, ἐκεῖνο σὺ ἴσθι, ὡς δυοῖν ἀνάγκη τὸ ἕτερον εἶναι, ἢ γὰρ ἡσσηθήσῃ τοῦ βασιλέως ἐν τῷδε τῷ πόνῳ, ἢ περιέσῃ, ἂν οὕτω τύχοι· ἢν μὲν οὖν νικῴης Ῥώμην γε καθελὼν, οὐ τὴν ἑτέρου του, ἀλλὰ τὴν σαυτοῦ ἀπολωλεκὼς ἂν, ὦ βέλτιστε, εἴης. καὶ διαφυλάξας, κτῆμά τι, ὡς τὸ εἰκὸς, τῶν πάντων κάλλιστον πλουτήσεις. ἢν δέ γε τὴν χείρω σοι τύχην κληροῦσθαι ξυμβαίη, σώσαντι μὲν Ῥώμην, χάρις ἂν σώζοιτο παρὰ τῷ νενικηκότι πολλή. διαφθείραντι δὲ, φιλανθρωπίας τε οὐδεὶς ἔτι λείψεται λόγος, καὶ προσέσται τὸ μηδὲν τοῦ ἔργου ἀπόνασθαι. καταλήψεται δέ σε καὶ δόξα τῆς πράξεως ἀξία πρὸς πάντων

3 Much more will this hold after a complete victory. Cicero does not approve of Corinth being destroyed; where, nevertheless, the Roman ambassadors had been shamefully treated. The same writer elsewhere says, that a war made against walls, roofs, columns, and posts, is horrible, wicked, and stained with all spite. Livy praises the clemency of the Romans, when Capua was taken, that there were no severities exercised, by conflagration and ruin, against harmless roofs and walls. So Agamemnon, in Seneca, declares he wished of Troy.

4 The Sacred History tells us of some cities, which were given up

Vincique volui: ruere et æquari solo,
Etiam arcuissem.

4 Sane docet nos sacra historia urbes quasdam a Deo damnatas excidio: etiam contra legem illam generalem arbores Moabitarum jussas exscindi. Verum non factum id odio hostili, sed in justam detestationem facinorum, quæ aut publice erant cognita, aut Deo judice tanti æstimata. *Jos.* vi. 2 *Reg.* iii. 19.

III. 1 Secundo eveniet quod diximus etiam in dubia agri possessione, si magna spes sit celeris victoriæ, cujus præmium et ager et fructus futuri sint. Sic Alexander Magnus milites, narrante Justino, a populatione Asiæ prohibuit, [f]*parcendum suis rebus præfatus, nec perdenda ea, quæ possessuri venerant.* Sic Quintius, Philippo Thessaliam transcurrente popu- Lib. xi. 6.

ἀνθρώπων, ἥπερ ἐφ' ἑκάτερά σοι τῆς γνώμης ἑτοίμως ἕστηκεν. ὁποῖα γὰρ ἂν τῶν ἀρχόντων τὰ ἔργα εἴη, τοιοῦτον ἀνάγκη καὶ ὑπὲρ αὐτῶν ὄνομα φέρεσθαι· *Antehac sic existimatum est, speciosa struere opera, sapientum esse et civilis vitæ scientum: structa demoliri, stultorum et vecordis animi signa ad posteros transmittere non erubescentium. Romam constat urbium, quas sol adspicit, maximam esse ac spectatu dignissimam: ea non unius labore hominis nec brevi tempore ad id magnitudinis splendorisque processit, sed plurimi reges atque Imperatores, virorum eminentium immensa series, multa sæcula, divitiarum stupenda congeries, tum alia, tum artificum primos huc traxere: ita illi, tanta urbe paulatim effecta, monumenta suæ virtutis post futuris reliquere. Quare in eam sævire id vero injuriam sit facere humano generi omnis ævi, eripiendo iis, qui olim fuere, debitæ laudis memoriam, venturis vero spectaculi voluptatem. Hæc cum eum in modum se habeant, cogita de duobus alterum necessario futurum, ut aut in hoc bello vincaris ab Imperatore, aut tua fortuna sit superior. Si tu victor, eversa urbe, non aliena, sed tua perdideris? eadem servata, possessione frueris omnium speciosissima: si adversa tibi sors ceciderit, Roma per te incolumi, reposita tibi erit apud victorem gratia: eadem jacente, jacebunt extra omnem spem misericordiæ res tuæ. Neque tantum nullus ad te facti fructus redibit, sed et digna facto fama te ab hominibus universis sequetur. Ea, in utram velis partem, tibi parata est: nam potentum quales sunt actiones, talis existimatio.* (Cap. 22.) Vide et legem Friderici I. apud Conradum Abbatem Urspergensem, et de Friderico comite Palatino chronica Melanchthonis.

[f] *Parcendum suis rebus præfatus*] Gelimer et Vandali obsidentes Carthaginem, neque prædas egere, neque terram vastarunt, sed curæ habuerunt ut

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to destruction; and that, even against the sacred law which we have mentioned; the trees of the Moabites were commanded to be cut down (2 Kings iii. 19); but this was not done in hostile spite, but in detestation of wickednesses, which were either publicly known, or were, in the judgment of God, worthy of such inflictions.

III. 1 In the second place, the rule which we mention will hold, even when the possession of the land is doubtful, if there be strong hope of a speedy victory, of which the reward will be, both the land and its fruits. So Alexander restrained his soldiers from wasting

Vit. Flam. p. 371 D. labunda manu, ipse hortatus est milites, ut Plutarchus loquitur, iter facere tanquam per concessam et ipsorum jam factam regionem. Crœsus Cyro suadens, ne Lydiam populandam Herod. i. 88. militi daret, *non meam*, inquit, *urbem, non res meas diripies: nihil enim ad me jam ista pertinent: tua sunt: tua illi perdent.*

2 Aliter qui faciunt, in eos non male quadrant illa Jocastæ ad Polynicem verba Thebaidibus Senecæ, (vers. 558, et seq.):

> Petendo patriam perdis: ut fiat tua,
> Vis esse nullam: quin tuæ causæ nocet
> Ipsum hoc, quod armis uris infestis solum,
> Segetesque adultas sternis, et totos fugam
> Edis per agros. Nemo sic vastat sua.
> Quæ corripi igne, quæ meti gladio jubes,
> Aliena credis.

Lib. iv. 14. Par sensus apud Curtium illis verbis: *quicquid non corrupissent, hostium esse confessi.* Unde non longe abeunt ea, quæ *Ep.* 7, 9, 10. Lib. ix. Cicero in literis ad Atticum disputat, adversus Pompeii consilium fame patriam necandi. Atque hoc nomine Alexander Cap. 3. Isius culpat Philippum libro Polybii xvii, cujus verba latine Lib. xxxii. 33. hunc in modum vertit Livius: *in bello non congredi (Philippum) æquo campo, neque collatis signis dimicare, sed refugientem incendere ac diripere urbes, et vincentium præmia victum corrumpere. At non sic antiquos Macedonum reges,*

suam. Procopius initio *Vandalicorum* secundi. (Cap. 1.) Apud Helmoldum lego Lib. i. cap. 66. *Nonne terra, quam devastamus, terra nostra est, et populus, quem expugnamus, populus noster est? quare ergo invenimur hostes nostrimet, et dissipatores vectigalium nostrorum?* cum his conveniunt, quæ Bembus habet

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Asia, telling them not to destroy what was to be their own. So Quintius exhorted his soldiers to march through Thessaly, as a country already their own. So Crœsus said to Cyrus, to dissuade him from wasting Lydia, *You will not destroy my possessions, but your own.*

2 To those who do otherwise, we may apply what Jocasta says in Seneca: *You destroy your country while you try to win it, &c.* So Curtius, *What they spoiled they acknowledged to belong to the enemy.* So Cicero argues against Pompey's design, of reducing his country by famine. And on this ground Alexander Isius blames Philip, as Livy translates from Polybius.

IV. 1 In the third place, this holds if the enemy can support himself from other quarters; as if the sea, or boundaries on another side, be open. So Archidamus exhorting the Lacedæmonians from

sed acie bellare solitos, urbibus parcere, quantum possent, quo opulentius imperium haberent. Nam de quorum possessione dimicetur tollentem, nihil sibi præter bellum relinquere, quod consilium esse?

IV. 1 Tertio idem fiet, si hostis habere possit aliunde, quo se sustentet: puta si mare, si fines alii pateant. Archidamus apud Thucydidem in oratione, qua Lacedæmonios suos Lib. i. 80, 81. a bello in Athenienses dehortatur, quærit, quas belli gerendi spes habeant: an forte, quod militum copia valeant, sperent Atticum agrum a se facile posse vastari: atqui, inquit, habent illi et terras alias suæ ditionis (Thraciam et Ioniam intelligens) et maritimis advectionibus adipisci possunt ea, quorum indigent. Tali ergo statu optimum factu, ut agricultura etiam in ipso collimitio tuta maneat: quod sub tributo utrique parti præstando factum diu in Belgico Germanico bello nuper vidimus.

2 Estque id consentaneum mori veteri Indorum, apud quos, ut [g]Diodorus Siculus loquitur, τῶν γεωργῶν ἱερῶν καὶ ἀσύλων ἐωμένων οἱ πλησίον τῶν παρατάξεων γεωργοῦντες, ἀνεπαίσθητοι τῶν κινδύνων εἰσί· *agricolæ intacti sunt ac veluti sacrosancti, imo prope castra et agmina opus faciunt sepositi a periculo.* Addit, τὰς χώρας τῶν ἀντιπολεμούντων οὔτ' ἐμπυρίζουσιν, οὔτε δενδροτομοῦσιν· *hostium agros neque urunt, neque excindunt arbores.* Postea: οὐδεὶς ἂν πολέμιος Cap. 40. *ejusd.* Lib. ii. περιτυχὼν γεωργῷ κατὰ τὴν χώραν ἀδικήσειεν, ἀλλ' ὡς

libro IX. (fol. 149. vers. *Edit. Venet.* 1551.) Paruta vero contra Germanos libro historiæ VI.

[g] *Diodorus Siculus*] Libro II. (cap. 36.)

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war with the Athenians, asks if they depend on wasting Attica, when the Athenians have other territories (Thrace and Ionia), and can obtain supplies by sea. In such a state of things, then, it is best that agriculture should be secure, even in the contested region, which we have lately seen practised in the war in Germanic Belgium*, on paying a tribute to both parties.

2 This is agreeable to the practice of the ancient Indians, among whom the cultivators worked undisturbed close to the camps, as a race sacred from injury, and beneficial to all.

* The War of the United Provinces against Spain. Gronovius says that this was not only done with regard to lawful Articles under Licenses (*Licenten*), but that ships of war were furnished out at Amsterdam for the enemy with the connivance of the magistrates.

κοινοὺς εὐεργέτας ἡγούμενοι, πάσης ἀδικίας ἀπέχονται· *hostis nemo cuiquam agricolæ damnum dat, sed id hominum genus, ut in commune beneficium, ab injuriis omnibus immune præstatur.*

De Cyr. inst. v. 4. § 13. 3 Inter Cyrum quoque et Assyrium convenisse ait Xenophon, ut *cum agricolis pax esset, cum armatis bellum.* [h] Sic Timotheus partem agri maxime frugiferam elocabat colonis, ut Polyænus narrat: imo, quod Aristoteles addit, ipsos etiam fructus vendebat hostibus, et ex ea pecunia stipendium præbebat militi: quod a Viriato etiam factum in Hispania testis est Appianus. Idque ipsum in eo quod diximus Belgico-Germanico bello summa cum ratione et utilitate fieri vidimus, exteris mirantibus.

Strat. iii. 10. § 5, 9. Œcon. ii. p. 507 A. Bell. Hisp. p. 291.

C. 2. De Treug. et Pac. 4 Hos mores humanitatis magistri canones Christianis omnibus, ut majorem ceteris humanitatem debentibus ac profitentibus, imitandos proponunt, ideoque non agricolas tantum, sed et animalia, quibus arant, et semina, quæ ad agrum portant, extra belli periculum poni volunt; nimirum similem ob causam, ex qua civiles leges, quæ ad arandum usui sunt, vetant in pignus capi, et apud Phrygas ac Cyprios olim,

L. 7. C. Quæ res pig. Nic. Damasc. Exc. Peires. p. 517.

[h] *Sic Timotheus*] De Megarensibus idem prodidit Plutarchus quæstionibus Græcis. (Qu. 17. p. 295 B.) de Totila, cum Romam obsideret, Procopius *Gotthicorum* III. τοὺς μέν τοι γεωργοὺς οὐδὲν ἄχαρι ἀνὰ πᾶσαν τὴν Ἰταλίαν εἰργάσατο, ἀλλὰ τὴν γῆν ἐκέλευεν ἀδεέως ᾗπερ εἰώθεισαν, ἐσαεὶ γεωργεῖν, τοὺς φόρους αὐτῷ ἀναφέροντας· *agricolis interim per omnem Italiam nihil mali intulit, sed jussit eos, ita ut soliti erant, terram perpetuo securos colere, modo ad ipsum tributa perferrent.* (Cap. 13.) Cassiod. XII. 5. *Defensorum maxima laus est, si, cum illi videantur prædictas regiones protegere, isti non*

3 Xenophon says that a convention was made between Cyrus and the Assyrians, that *there should be peace with the cultivator, war with the soldiers.* So Timotheus let the most fertile part of the land to husbandmen, as Polyænus relates, and even, as Aristotle adds, sold the produce to the enemy, to raise money to pay his soldiers; and so Viriatus did in Spain. And the same was done in the Belgico-Germanic war of which we have spoken, with great reason, and great advantage, to the admiration of foreigners.

4 These practices are proposed for imitation by the Canons, the teachers of humanity, to all Christians, as owing and professing a humanity greater than other men. And therefore these Canons direct, not only that cultivators should be out of danger of war, but animals for the plough, and the seed for sowing. And this is for the same reason for which the Civil Laws forbid the instruments of ploughing to be taken in pledge; and among the Phrygians and Cyprians of

postea [i]apud Atticos et Romanos bovem aratorem occidere nefas erat. Ælian. v. 14. *Var. Hist.* Dion. Chrys. *orat.* lxiv. p. 592 D.

V. Quarto evenit, ut res quædam ejus sint naturæ, quæ ad bellum faciendum aut ducendum nihil momenti habeant: quibus rebus parci etiam, manente bello, ratio vult. Huc pertinet [k]Rhodiorum oratio ad Demetrium urbicapum pro pictura Ialysi, sic a Gellio latine expressa: *quæ malum ratio est, ut tu imaginem istam velis incendio ædium facto disperdere? nam, si nos omnes superaveris, et oppidum hoc totum ceperis, imagine quoque illa integra et incolumi per victoriam potieris: sin vero nos vincere obsidendo nequieris, petimus consideres, ne turpe tibi sit, quia non potueris Rhodios vincere, bellum cum Protogene mortuo gessisse.* Lib. xv. 31. Polybius rabiosi esse animi ait, ea perdere, quæ nec hosti perdita vires adimant, nec perdenti emolumentum adferant, qualia sunt templa, porticus, statuæ, et similia. Lib. v. 11. Marcellus, laudante Cicerone, *ædificiis omnibus Syracusarum, publicis et privatis, sacris et profanis sic pepercit, quasi ad ea defendenda cum exercitu, non expugnanda venisset.* *In Verr.* iv. 54. Idem postea: *majores nostri relinquebant iis, quæ jucunda victis, nobis levia videbantur.* *Ibid.* c. 60.

desinant patrioticas possessiones excolere.

[i] *Apud Atticos et Romanos*] Etiam in Peloponneso. Varro II. *de Re Rustica*, (cap. 5.) Columella principio libri VI. His adde Plinium VIII. 45. Ælianum *de Historia Animalium* II. capite ultimo. Porphyrium II. *de Abstinentia*, (pag. 173, *et seqq.*) Vegetium III. *de Arte Veterinaria.*

[k] *Rhodiorum oratio ad Demetrium*] De hac re vide Plinium *Historiæ Naturalis* VII. 38. et XXXV. 10. et Plutarchum *Demetrio* (pag. 898 E.) Sensus idem in epistola Belisarii modo a nobis recitata.

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old, and among the Athenians and Romans, it was reckoned abominable to kill the ox that drew the plough.

V. In the fourth place, it happens that some things are of such a nature that they are of no effect in making or carrying on war; and these, it is reasonable should be spared during the war. To this case belongs the pleading of the Rhodians to Demetrius the City-taker, in favour of the painting of Ialysius, which Gellius gives. They tell him that if he destroy that part of the city, he will be supposed to make war upon Protogenes the great painter. So Polybius says, that it is a mark of a savage mind to make war on things which neither weaken the loser nor strengthen him who destroys them; as temples, porticos, statues, and the like. So Cicero says, that Marcellus *spared the buildings of Syracuse, public and private, as if his army had come to defend, not to destroy them.* And again, that *Our ancestors left to them what is a gratification to the conquered and a trifle to us.*

VI. 1 Hoc vero sicut in aliis ornamentis valet ob eam, quam jam diximus, causam: ita specialis ratio accedit in iis, quæ sacris usibus dicata sunt: quanquam enim et hæc, ut alibi diximus, publica suo modo sunt, atque ideo impune per jus gentium violantur, tamen si nullum inde periculum sit, conservari talia ædificia et quæ eis accedunt, [1]suadet rerum divinarum reverentia, inter eos maxime, qui eundem Deum ex eadem lege colunt, etiamsi forte sententiis quibusdam aut ritibus dissideant.

Sylv. *de bell.* p. 3. n. 5.

Lib. iv. 97.

2 Thucydides jus ait fuisse inter Græcos sui temporis, *ἰόντας ἐπὶ τῶν ἀλλήλων, ἱερῶν τῶν ἐνόντων ἀπέχεσθαι, ut, qui in hosticum impetum facerent, a locis sacris abstinerent.*

Lib. i. 29.

Alba a Romanis diruta Deum templis temperatum ait Livius. De Romanis Capua capta sic Silius libro XIII, (vers. 316, et seqq.):

[1] *Suadet rerum divinarum reverentia*] Polybius in *Excerptis Peirescianis:* (pag. 45.) *τὸ γὰρ τοῖς ἀνθρώποις ὀργιζόμενον, εἰς τὸ Θεῖον ἀσεβεῖν, τῆς πάσης ἀλογιστίας ἐστὶ σημεῖον· cum hominibus irascaris, ob id impie in Deos agere, summæ stultitiæ signum est.* Merito sane: nam et Severus *rescripsit, melius esse, ut quomodocunque illic Deus colatur, quam popinariis dedatur,* Lampridio referente, (cap. 49.) *Saguntinæ Dianæ templo pepercit religione inductus,* ait de Annibale Plinius *Naturalis Historiæ* XVI. 40. *Ἱερῶν οὐδὲ τοὺς ἀλλοφύλους πολεμίους ἀφῃρούμεθα· templa hostibus nec externis eripimus.* Appianus id habet civilium III. (pag. 516.) De Agesilao scriptor latinus vitæ ejus: *neque hoc solum in Græcia fecit, ut templa Deorum sancta haberet, sed etiam apud barbaros summa religione simulacra arasque conservavit. Itaque prædicabat mirari se, non sacrilegorum numero haberi, qui supplicibus eorum nocuissent: aut non gravioribus pœnis affici, qui religionem minuerent, quam qui fana spoliarent.* (Corn. Nepos, cap. 4.) De Agesilai sanctimonia in hac re etiam Plutarchum vide (pag. 606 A.) Idem multos pariter Romanos ejus laudis participes facit in Sulla (pag. 459 C. D.) *εἰς μνήμην ἐβάλοντο τοῦτο μέν τοι τὸν Φλαμίνιον, καὶ Μάνιον Ἀκύλιον, τοῦτο δὲ Αἰμίλιον Παῦλον, ὧν ὁ μὲν Ἀντίοχον ἐξελάσας τῆς Ἑλλάδος, οἱ δὲ τοὺς Μακεδόνων βασιλεῖς καταπεπολεμηκότες, οὐ μόνον ἀπέσχοντο τῶν ἱερῶν τῶν Ἑλληνικῶν, ἀλλὰ καὶ δῶρα καὶ*

VI. 1 And as this is true in all ornamental works, for the reason which we have mentioned, there is, besides, an especial reason in things dedicated to sacred uses. For though these, as we have said, are public in a peculiar way, and therefore may be violated with impunity by the laws of nations; yet if there be no danger from them, there is a motive for sparing them, besides those which have been mentioned, in the reverence for divine things: and especially, among those who worship the same God by the same law, even though they differ in some rites and doctrines.

2 Thucydides says that this was the rule of the Greeks. Livy says, that when Alba was destroyed, the temples were spared. When

Ecce repens tacito percurrit pectora sensu
Relligio et sævas componit numine mentes,
Ne flammam tædasque velint, ne templa sub uno
In cinerem [1]sedisse rogo.

Adversus Q. Fulvium Censorem dictum narrat Livius: *obstringere eum religione populum Romanum ruinis templorum templa ædificantem, tanquam non iidem ubique Dii immortales sint, sed spoliis aliorum alii colendi exornandique.* At Marcius Philippus, ad Dium cum venisset, metari sub ipso templo, ne quid in loco sacro violaretur, jussit. Narrat Strabo Tectosages, qui cum aliis pecunias Delphicas rapuerant, placandi numinis causa domi easdem cum additamento consecrasse.

Lib. xlii. 3.
Idem, xliv. 7.
Lib. iv. p. 188.

3 Ad Christianos ut veniamus, commemorat Agathias Francos templis pepercisse, ut qui cum Græcis essent ejusdem

Lib. ii. 1.

τιμὴν αὐτοῖς καὶ σεμνότητα πολλὴν προσέθεσαν· in memoriam revocabant alii Flaminium, alii Manium Aquilium et Æmilium Paulum, quorum ille, Antiocho ejecto e Græcia, hi vero, debellatis Macedonum regibus, non modo Græcanicis templis pepercerant, sed et donis ea multoque honore ac sanctimonia auxerant. Adi et Vitruvium Lib. II. (cap. 8.) Dionem XLII. (pag. 234 A. *Ed. H. Steph.*) Plutarchum *Cæsare* (pag. 720 E.) Brodæum V. miscellaneorum c. 29. Gabao Maurus ipse, non Christianus, honorem volebat haberi Christianorum ecclesiis, contra quam facerent Vandali, quibus sperabat iratum fore, quisquis ille esset, Christianorum Deum. Testatur hoc Procopius *Vandalicorum* I. (cap. 8) qui et *Persicorum* II. (cap. 9) Chosroen, Persam non Christianum, ecclesiæ Antiochiensium Christianorum ait pepercisse. Justinianus etiam, ut idem refert *Vandalicorum* II. (cap. 9) retinere apud se non ausus est res illas, quas Hierosolymorum templo Vespasianus abstulerat Romam, Romæ autem repertas in Africam asportaverat Gizerichus. De sanctimonia a Mahumetistis servata loco, in quo Ezechielis et trium Danielis sociorum ossa erant condita, testis est in itinerario Judæus Benjamin.

[1] *Traxisse* habent MSS. et ex illis nupera atque adcurata Editio: unde fecerant *transisse.* Nescio unde suam lectionem *sedisse* habeat noster: quamquam, post illum, ita quoque locum laudat J. G. Grævius, Vir Eruditissimus, in CIC. Verr. IV. 55. *J. B.*

Capua was taken, Silius speaks of the religious feeling which led the Romans to preserve the temples. Livy says that it was objected to Q. Fulvius the Censor, that he built temples with the ruins of temples, as if the gods were not everywhere the same; and thus involved the Romans in religious irreverence. When Marcius Philippus came to Dius, he ordered the tents to be pitched under the temple, that nothing in the sacred place might be violated. Strabo relates that Tectosages, who had plundered the treasures at Delphi, did, in order to appease the offended deity, consecrate them at his home with additional offerings.

3 To come to Christians: Agathias relates that the Franks spared

religionis. Imo et hominibus ob templa parci solitum, quod (ne profanarum gentium, quæ multa sunt exempla, adferam, Diod. xix. 73. quippe cum morem hunc κοινὰ τῶν Ἑλλήνων νόμιμα Scriptores vocent) [m]in Gothis Romæ captoribus sic laudat Augustinus: Lib. i. *de Civ. Dei*, c. 1. [n]*testantur hoc martyrum loca et basilicæ Apostolorum, quæ in illa vastatione victos ad se confugientes suos alienosque receperunt: hucusque cruentus sæviebat inimicus: ibi accipiebat limitem trucidationis furor: illo ducebantur a miserantibus hostibus, quibus* ([o]malim, *qui*, nam distinguit mitiores a durioribus) *etiam extra ipsa loca pepercerant, ne in eos incurrerent, qui similem misericordiam non haberent: qui tamen etiam ipsi alibi truces atque hostili more sævientes* [p]*posteaquam ad loca illa veniebant, ubi fuerat interdictum quod alibi jure belli licuisset, tota sæviendi refrænabatur immanitas, et captivandi cupiditas frangebatur.*

VII. 1 Quod de sacris dixi, idem de religiosis intelligendum est, etiam de iis, quæ in honorem mortuorum structa sunt: nam et hæc, quanquam jus gentium impunitatem iræ in ista exercendæ indulget, violari non possunt nisi contemta humanitate. *L.* 43. *D. de Relig.* Summam esse rationem aiunt jurisconsulti, quæ

[m] *In Gotthis Romæ captoribus*] Sub Alarico Ariano: cujus et hoc factum memorabile apud Cassiodorum XII. 20. *Rex Alarichus apostoli Petri vasa suis deferentibus cum excepisset, mox, ut rei causam habita interrogatione cognovit, sacris liminibus deportari diripientium manibus imperavit, ut cupiditas quæ deprædationis ambitu admiserat scelus, devotione largissima deleret excessum.*

[n] *Testantur hoc martyrum loca*] Exscripsit hunc locum Isidorus in Chronicis Gotthicis Æra CCCCXLVII.

[o] *Malim*, qui] Omnino sic legendum ostendit Orosius, eandem historiam referens Lib. VII. c. 28. [Nihil mutant tamen postremi Editores, e familia Monachorum Benedictinorum. *J. B.*]

[p] *Posteaquam ad loca illa veniebant*] Eisdem apostolorum basilicis Gotthi sub Vitige Romam obsidentes pepercerunt, teste Procopio *Gotthicorum* II. (cap. 4.) Etiam barbaris et non

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the temples; being of the same religion as the Greeks, whom they conquered. And even men were commonly spared on account of the temples, as (not to adduce examples of heathen nations, which are numerous, inasmuch as writers call this *the common usage of the Greeks*,) by the Goths, when they took Rome; which Augustine praises.

VII. 1 What has been said of sacred places, may be applied also to burial-places, and to the monuments of the dead: for these, though the Law of Nations allows wrath to do its work on them with impunity, cannot be violated without trampling on humanity. Jurists say that that is the highest Reason, which is on the side of religion. So

facit pro religione. Tam pro religiosis quam pro sacris pia exstat Euripidis sententia *Troadibus* (vers. 95, et seqq.):

> Μῶρος δὲ θνητῶν ὅστις ἐκπορθεῖ πόλεις,
> Ναούς τε τύμβους θ', ἱερὰ τῶν κεκμηκότων,
> Ἐρημίᾳ δοὺς, αὐτὸς ὤλεθ' ὕστερον.
>
> Homo quisquis urbes vastat et Dis Manibus
> Sedes sacratas, templaque, haud recte sapit:
> Nam similis ipsum pestis excidii manet.

Apollonius Tyanæus [q] de cœlo a gigantibus oppugnato fabulam Philos. v. 16.
sic interpretabatur: ὑβρίσαι εἰς τοὺς νεὼς αὐτῶν καὶ τὰ ἕδη, *vim eos intulisse Deorum templis ac sedibus.* Statio Annibal sacrilegus, [2] qui *Deum face miscuit aras.*

2 Scipio, capta Carthagine, milites donis ornat, χωρὶς τῶν εἰς τὸ Ἀπολλώνειον ἁμαρτόντων, inquit Appianus, *exceptis,* Punic. p. 83.
qui in Apollinis templum peccaverant. Trophæum a Mithridate structum Cæsar, ut narrat Dio, καθελεῖν οὐκ ἐτόλμησεν Lib. xlii. p. 234.
ὡς τοῖς ἐμπολεμίοις Θεοῖς ἱερώμενον, *tollere ausus non est, ut belli Diis sacratum.* Marcus Marcellus, quæ victoria profana fecerat, religione impeditus non attigit, ait Cicero Verrina Cap. 55.
quarta: et ibidem addit, [3] hostes esse aliquos, qui in bello reli-

Christianis jus confugii in talia loca profuit, vide Zosimum libro IV. (cap. 40. *Ed. Cellar.*) *de Tomitanis Barbaris.* Adde Helvetiorum legem apud Simlerum: (Pag. 302. *Ed. Elzevir.*) Nicetam *Alexio,* Manuelis filio: (cap. 4.) eundem Lib. I. *de Andronico,* ubi Siculos culpat ob violatas Antiochiensium ecclesias, (cap. 9.)

[q] *De cœlo a gigantibus oppugnato fabulam sic interpretabatur*] Ut et alteram de Epopeo Diodorus Siculus. [*Excerpt. Peiresc.* pag. 221. e Lib. VII.]

[2] En ipsa verba Poetæ:

> Præcipue quum sacrilegus face miscuit arces
> Ipsius [*Herculis*] immeritæque domos ac templa Sagunti
> Polluit, et populis furias immisit honestas.

Sylv. Lib. IV. *Sylv.* VI. vers. 82. *et seqq. J. B.*

[3] Hoc paullo ante legitur: *Non ut ab hoste aliquo, qui tamen in bello religionum et consuetudinis jura retineret, &c.* Caput in ora libri indicavimus. *J. B.*

Euripides, speaking both of temples and of tombs. Apollonius Tyanæus interpreted the war of the giants against the gods to mean, that they violated the temples. In Statius, Annibal is called *sacrilegus,* for that he *Deum face miscuit aras,* put the torch to the altar.

2 Scipio, when Carthage was taken, gave donations to the soldiers, except those who had transgressed against Apollo's temple. Cæsar would not venture to destroy the trophy erected by Mithridates, as being consecrated to the gods. Marcellus, withheld by religion, did not touch what victory only had made profane, as Cicero says; and adds, that there are enemies who, even in war, respect the rights of religion and

De Div. i. 37. gionis et consuetudinis jura retineant. Idem alibi Brenni
bellum fano Apollinis illatum, nefarium dixit. Pyrrhi factum,
qui Proserpinæ thesauros spoliasset, fœdum vocat Livius et in
Lib. xiv. 64. Deos superbum. Simile Himilconis Diodorus ἀσέβειαν et εἰς
Lib. xxxi. 26, 30, 31. θεοὺς ἁμάρτημα. Philippi bellum idem ille Livius nefarium,
quasi Diis superis inferisque illatum: etiam furorem, ac scelera.
Lib. ii. 7. n. 4. Florus de eodem, [r] *Philippus ultra jus victoriæ in templa,
aras, sepulchra sæviit.* Eandem historiam tangens Polybius
Lib. v. 11. hoc addidit judicium: τὰ μήτε τοῖς ἰδίοις πράγμασιν ἐπικουρίαν μέλλοντα μηδ' ἡντινοῦν παρασκευάζειν, μήτε τοῖς ἐχθροῖς ἐλάττωσιν πρός γε τὸν ἐνεστῶτα πόλεμον, ἐκ περιττοῦ καὶ ναοὺς, ἅμα δὲ τούτοις ἀνδριάντας καὶ πᾶσαν δὴ τὴν τοιαύτην κατασκευὴν λυμαίνεσθαι, πῶς οὐκ ἂν εἴποι τις εἶναι τρόπου καὶ θυμοῦ λυττῶντος ἔργον; *quæ neque nobis ad bellum futura sunt usui, nec hostibus incommodatura, ea ire perditum, templa maxime, et quæ in iis simulacra et similia ornamenta, quis neget malæ mentis et præ ira furibundæ esse opera?* atque ibidem talionis non admittit excusationem.

VIII. 1 Quanquam vero proprie instituti nostri hic non est, quid ex usu sit, inquirere, sed laxam bellandi licentiam adducere ad id, quod natura licitum, aut inter licita melius est; tamen ipsa virtus, vilis hoc sæculo, ignoscere mihi debet, si, quando per se contemnitur, ex utilitatibus ipsi pretium facio. Primum igitur moderatio ista in servandis rebus, quæ

[r] *Philippus ultra jus victoriæ in templa, aras, sepulchra sæviit*] Simile Prusiæ factum detestatus Polybius, cujus verba Suidas servavit in vocabulo

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custom. And elsewhere, he calls the violence of Brennus, done to the fane of Apollo, nefarious. The act of Pyrrhus, in despoiling the treasure of Proserpine, is called, by Livy, foul and contumacious against the Gods. So Diodorus speaks of Himilco; Livy, of Philip. Florus, of the same, calls it wickedness and madness. Polybius, touching on the same history, says the like, as already quoted; and does not admit the excuse of retaliation.

VIII. 1 Although it is not a part of our purpose to speak of the *advantages* of any course of conduct, but rather to restrain the loose license of war to that which is lawful by nature, or among the lawful ways, the better; yet even Virtue, in this age often little esteemed on her own account, ought to pardon me, if I try to make her value apparent by her utility. First, then, this moderation in preserving things which do not affect the course of war, takes away from an

bellum non morantur, magnum hosti telum eripit, desperationem. Archidami dictum est apud Thucydidem, μὴ γὰρ ἄλλο Lib. i. 82.
τι νομίζετε τὴν γῆν τῶν πολεμίων, ἢ ὅμηρον ἔχειν, καὶ οὐχ ἧσσον ὅσῳ ἄμεινον ἐξείργασται, ἧς φείδεσθαι χρὴ ὡς ἐπιπλεῖστον, καὶ μὴ ἐς ἀπόνοιαν καταστήσαντας αὐτοὺς, ἀληπτοτέρους ἔχειν· *terram hostilem non aliud quam obsidem censete, tantoque meliorem, quanto magis exculta est: quare et ut plurimum ei parcendum est, ne desperatio hostes reddat invictiores.* [s]Idem Agesilai consilium, cum Acarnanibus, con- Xen. *Hist. Gr.* iv. 6. n. 13.
tra quam sentiebant Achæi, liberam reliquit sementem, aiens, quo plus sevissent eo pacis cupidiores fore. Hoc est quod dicit satyra: *spoliatis arma supersunt.* Livius narrans cap- Juven. viii. 124.
tam a Gallis urbem: *placuerat,* inquit, *principibus Gallorum,* Lib. v. 42.
non omnia concremari tecta, ut quodcunque superesset urbis, id pignus ad flectendos hostium animos haberent.

2 Adde quod speciem hoc præfert, manente bello, magnæ de victoria fiduciæ: et quod clementia apta per se frangendis et conciliandis animis. Annibal apud Livium in Tarentino Lib. xxiv. 20.
agro nihil violat: *apparebat,* ait, *non id modestia militum aut ducis, nisi ad conciliandos Tarentinorum animos fieri.* Simili de causa Augustus Cæsar de Pannoniis rapina abstinebat. Causam Dio adfert: ἤλπιζε γὰρ ἐθέλοντας αὐτοὺς Lib. xlix. p. 472 D, E.
ἐπάξεσθαι· *sperabat enim fore, ut sic eos sine vi sibi adjungeret.* Timotheus ea cura, quam supra narravimus, præter alia πολλὴν τὴν εὔνοιαν τῶν πολεμίων ἐθήρευεν, ait Poly- Lib. iii. 10. n. 9.

Prusiæ, et *Excerpta Peiresciana.* (pag. 337.)

[s] *Idem Agesilai consilium*] Meminit et Plutarchus Agesilao. (Pag. 608 B.)

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enemy that great weapon, despair. So Archidamus says, that the enemy's land is a hostage, to be spared that despair may not give them strength. So Agesilaus advised to let the Acarnians sow their land; saying, that they would be all the more desirous of peace. So Juvenal, *spoliatis arma supersunt,* when men have lost all they find arms. So Livy says the Gauls judged, when they took the city.

2 Add, that such a course, during war, presents the appearance of a great confidence of victory; and that clemency is apt to bend and conciliate men's minds. So Annibal, in his conduct towards the Tarentines, does not waste the land; not from moderation, but to conciliate them. So Augustus acted towards the Pannonians. So Timotheus, in the case already mentioned, obtained the good will of the enemy. So Quintius and the Romans, in the case above given, found that, as the fruit of their conduct, the cities of Thessaly and the

ænus, *magnam ab hostibus ipsis benevolentiam captabat.* [t]De Quintio et qui cum eo erant Romanis Plutarchus cum quæ supra diximus commemorasset, addit: *hujus modestiæ non multo post fructum cepisse; nam ut in Thessaliam perventum est, defecerunt ad eum urbes. Tum vero et qui intra Thermopylas habitabant Græci Quintium ardentibus votis desiderabant: Achæi vero, renuntiata Philippi amicitia, societatem adversus eum cum Romanis inierunt.* De Lingonum civitate quæ bello, quod ductu Cerealis, auspiciis autem Domitiani, in Civilem Batavum ejusque socios gerebatur, populationem formidatam evaserat, sic narrat Frontinus, *quod contra exspectationem inviolata nihil ex rebus suis amiserat, ad obsequium reducta septuaginta millia armatorum tradidit ei.*

Pag. 371 D. Vit. Flam.

Lib. iv. 3. n. 14.

3 Consiliis contrariis contrarii quoque eventus: exemplum dat Livius in Annibale: *Præceps in avaritiam et crudelitatem animus, ad spolianda quæ tueri nequibat, ut vastata hosti relinquerentur, inclinavit. Id fœdum consilium cum incepto tum etiam exitu fuit: neque enim indigna patientium modo abalienabantur animi, sed ceterorum etiam: quippe ad plures exemplum quam calamitas pertinebat.*

Lib. xxvi. 38.

4 Verissimum autem sentio, quod a theologis quibusdam notatum est, et summarum potestatum et ducum qui Christianos se et a Deo et ab hominibus haberi volunt officium esse, violentis urbium direptionibus et si quid his simile est intercedere, ut quæ abire non possint sine gravissimo multorum inno-

Ægid. Reg. *de act. sup. disp.* 31. *dub.* 7. *num.* 127.

[t] *De Quintio*] Nempe T. Quintio Flaminio.

[4] Testis est Æschines: Ἐν οἷς ἔνορκον ἦν τοῖς ἀρχαίοις, Μηδεμίαν πόλιν τῶν Ἀμφικτυονίδων ἀνάστατον ποιήσειν, &c. Orat. de male obita

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others came over to them. The city of the Lingones, *which escaped the apprehended ravage in the war against Civilis, was reduced to obedience, and supplied seventy thousand armed men;* as Frontinus relates.

3 The opposite cause leads to an opposite result. Livy gives an example in Annibal, when he committed ravage in his retreat, and alienated the minds, both of those who suffered, and of those who feared.

4 It is also most true, as some theologians have noted, that it is the duty of rulers and leaders, who wish to be reckoned Christians by God and by men, to abstain from storming of cities, and other like violent proceedings; which cannot take place, without great calamity to many innocent persons, and often do little to promote the ends of

centium malo, et sæpe ad belli summam parum proficiant: ita ut bonitas Christiana fere semper, ipsa quoque justitia plerumque ab ipsis abhorreat. Majus sane est Christianorum inter se vinculum, quam olim Græcorum fuit, quorum bellis ne qua [4]urbs Græca exscinderetur cautum erat Amphictyonum decreto. Et Alexandrum Macedonem narrant veteres nullius rei a se actæ magis ductum pœnitentia, [5]quam quod Thebas evertisset.

legat. pag. 262 A. *Edit. Basil.* 1572. *J. B.*

[5] Vide, inter alios, PLUTARCHUM, *Vit. Alexandr.* pag. 671 B. *J. B.*

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the war: so that Christian goodness almost always, justice mostly, must inspire a repugnance to them. The tie of Christians amongst each other is closer than was that of the Greeks formerly; and yet there was a decree of the Amphictyons, that in their wars, no Greek city should be destroyed. And the ancients relate, that Alexander the Great never repented of anything, so much as he did of the destruction of Thebes.

CAPUT XIII.

TEMPERAMENTUM CIRCA RES CAPTAS.

I. *Res etiam hostilium subditorum bello captas retineri ad modum debiti:*

II. *Non etiam in pœnam alieni criminis.*

III. *Debitum hic intelligi etiam quod in bello subnascitur. Exempla.*

IV. *Humanitatis esse, summo jure hic non uti.*

I. 1 SED neque peccato vacare, aut a restitutionis onere immunis censeri debet rerum hostilium in bello justo captura. Quippe [a]si id quod recte fit spectas, non ultra licitum est capere aut habere quam causa subest debendi in hoste: excepto quod etiam extra eam ad securitatem necessariæ res possunt detineri, sed restituendæ cessante periculo, in se aut in pretio, secundum ea quæ libro II. cap. ii. tractavimus: nam quod et in re pacatorum liceret, multo magis in re hostium licet. Hoc igitur est capiendi quoddam jus, sine acquirendi jure.

Vict. *de jure bell.* n. 55, 56.

[a] *Si id quod recte fit spectas*] Vide quod judicavit Innocentius Romanus Pontifex apud Bembum I. (fol. 12. *Ed. Venet.* 1551.)

[b] *Aut ex pœna*] Romani Prusiam Attalo jusserunt et damnum resarcire et pœnam insuper pendere. [Habet Auctor noster ex APPIANO ALEXANDRINO, *Bell. Mithrid.* pag. 172, 173. *Ed. H. Steph. J. B.*]

[1] Vide supra, Lib. II. cap. ii. num. 3. *J. B.*

CHAPTER XIII. *Restraints respecting Captures.*

I. 1 Even the capture of what belongs to the enemy in a just war, is not to be conceived to be free from fault, or relieved from all burthen of restitution. For if you look at what is right, it is not lawful to take or have anything, beyond what rests on the enemy's debt to you; except that beyond this, things necessary to your safety may also be detained, but are to be restored when the peril is over, either in themselves or in their price; as we have explained, B. II. C. ii. For what would be lawful in things belonging to those with whom we are at peace, is still more clearly lawful in the case of an enemy. This is the right of taking, without the right of keeping.

2 As a debt may be due to us, either to rectify an existing inequality, or as a punishment; so a thing belonging to the enemy may be acquired either way, but with a difference. For as we have said above, in virtue of the former kind of debt, the property, not only of the debtor himself, but of his subjects also, is bound by the Instituted

2 Cum autem deberi aliquid nobis possit, aut ob inæqualitatem rerum, [b]aut ex pœna, potest ex utraque causa acquiri res hostilis, sed cum discrimine tamen : nam supra diximus, ex debito illo priore non res tantum debentis sed et subditorum ejus ex introducto jure gentium quasi fidejussione obligari. Quod quidem jus gentium alterius generis credimus, quam illud quod in impunitate sola aut externa vi judiciorum consistit. Nam sicut in res nostras, ex consensu privato nostro, ei quicum actum est, non externum modo, sed et internum jus quæritur, sic et ex communi quodam consensu, qui singulorum consensum vi quadam in se continet, quo sensu lex πόλεως συνθήκη κοινὴ, [1]*communis pactio civitatis* dicitur. Atque id in hoc negotii genere placuisse gentibus eo est credibilius, quia hæc lex gentium non [2]solum majoris mali vitandi causa, sed etiam juris cuique sui consequendi gratia introducta est.

Cajet. *in sum. pecc. verb. bell. damn.* Covarr. *ad d. c. peccat.* p. 11. § 11. Vict. *de jure bell.* n. 39. et 41. et Molin. ii. *tract. disp.* 117.

II. At in altero debendi genere quod pœnale est, non video gentium consensu tale jus in res subditorum esse proditum : odiosa enim est talis rerum alienarum obligatio, ideoque latius produci non debet quam actum appareat. Neque vero par est utilitas in posteriore hoc et in priore debendi genere :

[2] Omnes Editiones, etiam prima, habent heic *sola,* quæ vox manifesto mendosa est. Mutavimus igitur, ut sensus postulabat, quemadmodum et initio Capitis, ubi etiam in omnibus Editionibus hactenus legebatur: *excepto quod etiam extra eam ad securitatem* NECESSARIAM *res possunt detineri ;* pro, *ad securitatem* NECESSARIÆ *res :* quæ menda a nemine animadversa, mirum sane est. *J. B.*

Law of Nations, as under a kind of suretyship. And this Law of Nations we hold to be of another kind from that which consists only in impunity, or the compulsion of tribunals. For, as he with whom we deal, does, by our private consent, acquire, not only an external right to our property, but an internal also; so also is such a right acquired from a kind of common consent which contains in itself by a peculiar force the consent of individuals; in which sense, the Law is called *the Common Pact of the State.* And that such an appointment was intended by nations, in this case, is the more probable, inasmuch as this Law of Nations is introduced, not only for the sake of avoiding a greater evil, but in order that each one may obtain his own right.

II. But in the other kind of debt, which is debt as penalty, I do not see that such a right over the property of subjects is established by the Law of Nations. For such an obligation, imposed on the property of another, is an odious rule, and therefore ought not to be carried further than it appears to be actually settled; nor is the

nam prius illud est in bonis, posterius hoc non est, ideoque persecutio ejus sine damno omitti potest. Nec obstat quod supra de jure Attico diximus. Nam ibi homines obligantur non ex eo proprie quod civitas puniri poterat, sed duntaxat ad cogendam civitatem id facere quod facere debebat, id est, judicium reddere in sontem; quod debitum ex officio ad prius illud, non ad posterius debendi genus refertur: aliud enim est debere punire, aliud debere aut posse puniri, quanquam ex cessatione circa illud hoc sequi solet, sed ita ut distincta sit causa illa et hoc effectum. Ergo pœnæ nomine acquiri res subditorum hostilium non poterunt, sed eorum duntaxat qui ipsi deliquerint, in quibus et magistratus continentur qui delicta non puniunt.

Lib. iii. 2. n. 3.

III. Ceterum res subditorum et capi et acquiri possunt, non tantum ad consecutionem debiti primarii, unde ortum est bellum, sed et subnascentis, secundum ea quæ diximus initio hujus libri. Et sic accipiendum est, quod scribunt theologi quidam, capta in bello non compensari cum debito principali:

Silv. *verb. bell.* n. 10. Vict. n. 51. Bart. *in l. si quid bello. D. de capt.*

c *Impensam, quæ in bellum facta esset*] Meminit Polybius excerpto legationum 23. Sic et a Sulla damnati Asiatici, narrante in Mithridaticis Appiano. (Pag. 213.) Morem hunc pro se allegat rex Poloniæ, apud Thuanum libro LXXIII. anno CIↃIↃLXXXI. Sic apud Homerum *Iliados* Γ vocem τιμὴν scholiastes interpretatur πρόστιμον τοῦ πολέμου· λέγει δὲ τὸ ἥμισυ τῶν ἐν τῇ πόλει κτημάτων· *belli æstimationem, dimidium nempe rerum quæ in urbe erant.* (Ad vers. 286.)

[3] Est apud Justinum, *belli lege victi,*

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utility of the extension on a parity, in this, and in the other kind of debt: for the other is a part of my property, but this is not; and therefore the exaction of it may be omitted without wrong. Nor is there any objection, in what we have said above of the Attic law. For in that case, men were obliged, not properly because the city could be punished, but only in order to compel the city to do what it ought to do, that is, to pass judgment on a guilty person; which official debt is to be referred to the former kind of debt, not to the latter. For it is one thing to owe the duty of punishing, another, to owe or to be liable to a punishment; although, from the omission of the former, the latter often may follow; but still, so that they are distinct, the former as the cause, and the latter as the effect. Therefore the property of subjects cannot be acquired on the ground of penalty, but that of those only who have offended; among whom are included also the magistrates, who do not punish offenses.

III. But the property of subjects may be both taken and kept, not only for the exaction of the primary debt, from whence the war arose, but also of a debt which grows up during the process, as we

intelligendum enim hoc usque dum secundum sanum judicium satisfactum sit de eo damno quod in ipso bello datum est: sic in disceptatione cum Antiocho Romani, Livio narrante, Lib. xxxvii. 35. [c]impensam, quæ in bellum facta esset, omnem præstare regem æquum censebant, cujus culpa bellum excitatum esset. Apud Justinum est *impensas belli lege justa* [3]*suscepturus:* apud Lib. xxxiii. 1. Thucydidem damnantur Samii *χρήματα τὰ ἀναλωθέντα* Lib. i. 117. *ἀποδοῦναι, solvere belli impensas.* Et alibi sæpe. Quod autem victis juste imponitur, idem et bello juste extorquetur.

IV. 1 Ceterum sciendum est, quod et alibi meminimus, latius patere caritatis quam juris regulas. Qui divitiis floret, immisericordiæ reus erit, si inopem debitorem omnibus reculis suis excutiat, ut ipse ultimum quadrantem consequatur, multoque magis si is ipse debitor in id debitum venerit sua bonitate, ut si pro amico fidejusserit, ipse autem nihil pecuniæ verterit in rem suam. [d]*Miserabile enim est,* ut ait pater Decl. 273. Quintilianus, *sponsoris periculum.* Tamen tam durus creditor contra jus stricte dictum nihil facit.

nec ulla varietas lectionis notatur in Editione Græviana, nec in ultima V. Cl. Abr. Gronovii. *J. B.*

[d] Miserabile enim est, *ut ait pater Quintilianus,* sponsoris periculum] Addit salvo pudore ad sponsorem non aliter creditorem venire, quam si recipere a debitore non possit. Bene *salvo pudore:* nam sponsores appellare, videtur habere quandam *δυσωπίαν,* ut ait Cicero *ad Atticum* xvi. 15. [Vide Noodt. *Jul. Paul.* cap. xi. *J. B.*]

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said at the beginning of this Book. And in this sense, we are to take what is said by some theologians, that captures in war are not to be reckoned only in the way of compensation for the principal debt. For this is to be understood until, according to a sound judgment, satisfaction is made for the damage which has been inflicted in the war itself. Thus the Romans in their dispute with Antiochus, thought it a reasonable demand that the king should repay all the expenses of the war, since by his fault the war took place. So, of the expenses of the war, in Justin, Thucydides; and elsewhere frequently. And what is justly imposed on the conquered, is justly extorted by war.

IV. 1 But here too, we must recollect what we have elsewhere said, that the rules of charity are wider than those of justice. He who abounds in wealth, is guilty of want of clemency, if he wring a needy debtor with stringent rules, and exact the uttermost farthing: and still more, if that debtor have run into the debt by his own goodness, as for instance, by being security for a friend, without having turned any of the money to his own profit. *The danger of a surety is to be pitied,* as Quintilian says. And yet even so hard a creditor does nothing against strict right.

2 Quare [e] exigit humanitas, ut his qui extra culpam sunt belli, quique non alio quam fidejussorio nomine obstricti sunt, relinquantur res istæ quibus nos facilius quam ipsi careamus, præsertim vero si satis appareat illos ipsos id, quod eo modo amiserunt, a civitate sua non recuperaturos. Huc pertinet quod Babylone capta Cyrus militibus dixit: *οὔκουν ἀδικίᾳ γε ἕξετε ὅ, τι ἂν ἔχοιτε, ἀλλὰ φιλανθρωπίᾳ οὐκ ἀφαιρήσεσθε, ἤν τι ἐᾶτε ἔχειν αὐτούς· injuste quidem non possidebitis quæ tenetis; sed si quid non auferetis hostibus, id vestræ erit humanitatis.*

Xen. *de Cyri Inst.* vii. 5. n. 26.

3 Notandum et hoc, cum in subsidium introductum sit jus hoc in bona subditorum innocentium, quamdiu spes est nos nostrum satis facile consequi posse ab originariis debitoribus, aut ab iis qui jus non reddendo sponte sua debitores se faciunt, ad eos venire qui culpa vacant, etiamsi concedatur cum stricto jure non pugnare, abire tamen ab humanitatis regula.

Ægid. Reg. *de act. supern. disp.* 31. *dub.* 7. n. 117.

4 Exempla hujus humanitatis exstant passim in historia præsertim Romana, ut cum agri hostibus devictis ea conditione concessi ut in civitatem venirent, id est, victæ civitati cederent, aut cum ex agris modicum, honoris gratia, [f] veteri

L. 16. *D. de acq. rer. dom. d. l.* 16. *l.* 15. § 2. *D. de rei vind.* Vict. *de jure bell.* n. 40. Silv. *in verb. bell.* p. 1. § 10. n. v. 3.

[e] *Exigit humanitas*] Ptolemæus Demetrio Antigoni filio tabernaculum et alia ad curam corporis ipsius pertinentia, pecunias quoque captas remisit, dicens non de omnibus rebus, sed de imperio et honore inter ipsos certari. Narrat Plutarchus Demetrio. (pag. 891 A.) Vide et factum Sanctii Vasconum regis apud Marianam Lib. xi. cap. 16.

[f] *Veteri possessori relinquebatur*]

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2 Wherefore humanity requires that we should leave, to those who are not in fault in the war, and who are only bound as sureties, the things which we can do without, better than they can: especially if it appear that they will not recover from their city what they thus lose. So Cyrus, when Babylon was taken said to his soldiers, *What ye do not take from the enemy, they will owe to your humanity.*

3 This also is to be noted, that so long as we have a hope of receiving our debt from the original debtor, or from those who have made themselves debtors by not yielding our right, to come upon those who are free from fault, although it may not be at variance with strict law, is contrary to humanity.

4 Examples of this humanity are everywhere extant in history, especially that of Rome: as when, on the conquest of a country, the lands were granted, on condition that they should belong to the conquered city: or when a portion of the land was left *honoris gratia* to the old possessors. Thus the Veientes were mulcted of part of their

possessori relinquebatur. Sic a Romulo Veientes agri parte Liv. i. 15. mulctatos narrat Livius. Sic Uxiis Alexander Macedo agros Arr. iii. 17. quos habuerant dedit vectigales. Sic deditas urbes non diripi sæpe legas: et supra diximus, non personis tantum, sed et rebus agros colentium cum laude et ex pio canonum præscripto parci, saltem sub tributo; et sub simili tributo solere et mercibus concedi a bello immunitatem.

Appianus *Civilium* II. *τῶν δὲ πολεμίων ὅτε κρατήσαιεν, οὐδὲ τούτων ἅπασαν τὴν γῆν ἀφῃροῦντο, ἀλλ' ἐμερίζοντο· Romani veteres ne hostibus quidem victis omnes agros adimebant, sed cum eis partiebantur.* (Pag. 516.) Sic et Vandalos in Africa et in Italia Gotthos fecisse historiæ nos docent.

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land by Romulus. So Alexander of Macedon gave the Uxii their lands, on the payment of tribute. So you often read that cities which surrendered, were not plundered. And we have said above, that not only persons, but the lands themselves of the cultivators, were often spared, with general approval, and according to the pious precept of the Canons, at least under tribute; and that, under a like tribute, merchants have been accustomed to receive protection in war.

CAPUT XIV.

TEMPERAMENTUM CIRCA CAPTOS.

Vict. *de Jure belli*, n. 41. Less. *l.* 11. *c.* 5. *dub.* 5. Covar. *c. pec.* p. 11. § 11. Molin. *disp.* 120. et 121. Valent. *disp.* 3. q. 16.

I. 1 QUIBUS in locis captivitas hominum et servitus in more est, si internam justitiam respicimus, limitanda primum est ad rerum instar, ut scilicet eo usque licita sit talis acquisitio, quo usque debiti aut primarii, aut subnascentis quantitas patitur, nisi forte in ipsis hominibus peculiare sit delictum quod libertatis damno puniri æquitas ferat. Hactenus igitur nec ultra justum bellum gerens in hostis subditos captos jus habet, idque in alios valide transfert.

[a] *Quod non omnes qui inter hostes fuerant servos fecisset*] Filius ejus Alexander Thebis captis exemit servituti et sacerdotes, et eos qui decretis in se factis non adsenserant: narrat Plutarchus in vita ejus. (Pag. 570 E.)

[b] *Captivum se dicebat, non servum*] Philo: ἐπεὶ καὶ πατέρες υἱῶν τιμὰς κατέθεσαν, καὶ υἱοὶ πολλάκις πατέρων, ἢ κατὰ λῃστείας ἀπαχθέντων ἢ κατὰ πόλεμον αἰχμαλώτων γενομένων, οὓς οἱ τῆς φύσεως νόμοι τῶν κάτωθεν ὄντες βεβαιότεροι γράφουσιν ἐλευθέρους· *nam et patres pro filiis et filii pro parentibus sæpe pretium pependerunt, aut vi latronum abreptis, aut belli more captis, quos quidem naturæ leges valentiores his quæ in terra fiunt legibus, scri-*

CHAPTER XIV. *Restraints respecting Prisoners.*

I. 1 In those places in which the captivity and servitude of men is usual, it must, if we regard internal justice, be limited in the same way as property; so that we may have such acquisitions, only so far as is permitted by the amount of a debt, either primary or subnascent; except there should be some peculiar delict, which equity allows to be punished by the loss of liberty. So far, therefore, and no further, has a belligerent right over captive enemies, and the power of a valid transfer of such right to others.

2 It will moreover be the duty of equity and goodness, to apply, here also, those distinctions which we noted before, with regard to

2 Erit autem æquitatis et bonitatis officium hic quoque ea adhibere discrimina, quæ, cum de interficiendis hostibus ageretur, supra annotata sunt. Demosthenes in epistola pro Lycurgi liberis laudat Philippum Macedonem, [a] quod non omnes, qui inter hostes fuerant, servos fecisset: *καὶ γὰρ οὔτε δίκαια εἶναι πρὸς ἅπαντας τὰ αὐτὰ, οὔτε καλὰ ἡγεῖτο, ἀλλὰ τὴν τῆς ἀξίας προσθήκην συλλογιζόμενος, τὰ τοιαῦτ' ἐπέκρινεν· neque enim*, inquit, *eadem in omnes aut æqua aut honesta censebat, sed rem exputans cum accessione ejus quod quisque meruisset, etiam in talibus velut judicem agebat.* Pag. 114 B.

II. 1 Sed primum notandum hic est, jus illud quod quasi ex fidejussione pro civitate oritur, neutiquam tam late patere, quam jus quod ex delicto nascitur in eos qui pœnæ servi fiunt. Unde Spartanus quidam [b] captivum se dicebat, [1] non servum: nam si rem recte inspicimus, jus hoc generale in captos ex bello justo par est ei juri quod habent domini in eos qui se paupertate coacti in servitutem vendiderunt, demto quod etiam magis miseranda est eorum calamitas, qui non suo facto speciali sed regentium culpa in eam sortem deveniunt. *Δεινότατον δοριαλώτους γενέσθαι· res acerbissima est belli jure captivum fieri:* teste Isocrate. *Plat.* p. 300 A.

bunt liberos. (Lib. *Quod omnis Probus liber*, pag. 870 E.) Nimirum ut apud Theodecten Helena loquebatur:

> Θεῶν ἀπ' ἀμφοῖν ἐκγόνον ῥιζωμάτων,
> Τίς ἂν προσειπεῖν ἀξιώσειεν λάτριν;
>
> Utraque generis parte prognatam Deis,
> Eritne servam nominare qui audeat?

[Habet hoc Auctor noster etiam in *Excerptis ex Tragœd. et Comœd. Græc.* pag. 445. sed non docet, unde hauserit. Reperies apud ARISTOTELEM, *Politic.* Lib. I. cap. VI. pag. 302 B. *Ed. Paris.* ubi legitur: Θείων δ' ἀπ', &c. ut et in Heinsii Editione, cum Paraphrasi. *J. B.*]

[1] Refert id PLUTARCHUS, *Apopth. Lacon.* pag. 234 C. Tom. II. *Ed. Wechel.* *J. B.*

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killing enemies. Demosthenes praises Philip, because he did not make slaves of all who had been his enemies, but weighed their deserts.

II. 1 But first, this is to be noted; that the right which arises from citizens being a sort of surety for the State, is by no means to be extended so widely as the right which arises *ex delicto* against those who are penal slaves. And thus, a certain Spartan said, that he was a captive, but not a slave. For if we rightly look at the matter, this general right against captives, is on a like footing with the right of a master over those who have sold themselves into slavery under the compulsion of want; abstracting the heavier part of their calamity, that they have come into that case, not by any special act of their

2 Est ergo servitus hæc perpetua obligatio operarum, pro alimentis itidem perpetuis. Chrysippea definitio huic generi servorum optime congruit: *servus est perpetuus mercenarius.* Et lex Hebræa eum qui inopia coactus se vendidit diserte mercenario comparat. [2]Deut. xv. 18, 40, 53, et in redemtura ejus operas ita vult ipsi prodesse sicut fructus ex agro vendito percepti prodessent veteri domino. Deut. xviii. 50.

Sen. *de Ben.* iii. 22.

3 Multum ergo distat id quod impune in servum fit ex gentium jure, et id quod naturalis ratio fieri sinit. Ex Seneca supra citavimus: *cum in servum omnia liceant, est aliquid quod in hominem licere commune jus animantium vetet.* Philemonis illud eodem tendit:

i. *de Clem.* c. 18.

Apud Stob. *Tit.* 62.

Κἂν δοῦλος ᾖν τις οὐδὲν ἧττον, δεσπότα,
Ἄνθρωπος οὗτός ἐστιν ἂν ἄνθρωπος ᾖ.

Here, quisquis est homo natus, quamvis serviat
Is servitutem, tamen esse homo non desinit.

Alibi item Seneca: *servi sunt, imo homines: servi sunt, imo contubernales: servi sunt, imo humiles amici: servi sunt, imo conservi:* quæ et apud Macrobium legas sensum plane eundem habentia cum Pauli apostoli dicto: *Domini, jus et æquum est servis præstare, gnari vobis quoque dominum esse in cælo.* Et alibi vult dominos cum servis non minaciter

Ep. xlvii.

Saturn. i. 11.

Colos. iv. 1.

Ephes. vi. 9.

[2] Heic mendose omnes Editiones, a prima usque, sese habent. Legendum, ut ad Pufendorfium obiter observavimus, [Levit. xxv. 40, 53. et postea, pro Deut. xviii. 50. reponendum, Levit. xxv. 27, 50. Res statim patebit inspicienti loca illa. *J. B.*

c Ἐν πικρίᾳ ψυχῆς] Sic et in epi-

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own, but by the fault of the rulers. *It is the bitterest lot, to be a captive by the laws of war,* as Isocrates says.

2 This servitude, then, is the perpetual obligation of working for perpetual aliment. The definition of Chrysippus here exactly applies; *A slave is a perpetual labourer for hire.* And the Hebrew law plainly compares him who, under the compulsion of need, has sold himself, to a labourer for hire; and directs that in redeeming him, his labour shall be reckoned in the same way that the produce which has been gathered from land sold is to be reckoned to the former owner. Deut. xv. xviii.

3 There is a great difference between that which may be done with impunity towards a slave by the Law of Nations, and that which natural reason suffers to be done. We have before cited Seneca to this effect. So Philemon says, *A slave does not cease to be a man.* Seneca adds that *Slaves are not only men, but fellow-lodgers, humble friends, fellow-servants:* agreeing plainly with what St Paul says,

agere, eo quod jam diximus argumento, quod et ipsi dominum in cœlo habeant, qui ad talia qualitatum discrimina non attendat. In constitutionibus quæ Clementi Romano asscribi solent legitur, *οὐκ ἐπιτάξεις δούλῳ σου, ἢ παιδίσκῃ* [c] *ἐν πικρίᾳ ψυχῆς, cave servo aut ancillæ imperes acerbo animo.* Clemens Alexandrinus servis nos uti vult tanquam alteris nobis, quando homines sunt non minus quam nos, secutus sapientis Hebræi dictum: *εἰ ἐστί σοι οἰκέτης, ἄγε αὐτὸν ὡς ἀδελφὸν, ὅτι ὡς ἡ ψυχή σου· si servum habeas, ut fratre utere, talis enim est qualis tu.*

Lib. vii. 13.

Pædag. iii. 12. p. 307.

III. Jus ergo vitæ et necis quod dicitur in servum domino præstat, ut domesticam habeat jurisdictionem, sed nimirum eadem religione exercendam, qua publica exercetur. Hoc voluit Seneca, cum dixit: *in mancipio cogitandum non quantum illud impune pati possit, sed quantum tibi permittat æqui bonique natura, quæ parcere etiam captivis et pretio paratis jubet:* qui et alibi, *quid interest,* ait, *quali quis teneatur imperio, si summo tenetur?* quo loco comparat subditum servo, et ait dispari titulo paria in illos licere: quod certe in hac parte vitæ adimendæ, et si quid eo accedit, verissimum est. *Majores nostri,* ait idem [d] Seneca, *domum nostram pusillam rempublicam esse judicarunt;* et Plinius:

L. 1. *de Clem.* c. 18.

Lib. iii. *de Ben.* c. 18.

Lib. viii. *Epist.* 16.

stola Barnabæ est: *οὐ μὴ ἐπιτάξῃς παιδίσκῃ ἢ δούλῳ σου ἐν πικρίᾳ, τοῖς ἐπὶ τὸν αὐτὸν ἐλπίζουσι, μήποτε οὐ φοβηθήσῃ τὸν ἐπ' ἀμφοτέροις Θεόν. noli acerbe imperare servo aut ancillæ tuæ in Christum sperantibus, ne eo ipso ostendas non timere te communem tibi et ipsi Dominum.* (Cap. 19.)

[d] *Seneca*] Epistola XLVII.

Colos. iv. 1. And elsewhere, Eph. vi. 9, he directs masters to do good to their slaves, forbearing threatening, on the same ground, knowing that their Master also is in heaven, who does not regard such differences. In the Clementine Constitutions we have the same. So Clemens Alexandrinus bids us use our slaves as our other selves, since they are men no less than we; following the saying of the Hebrew wise men.

III. The right of life and death over a slave, then, gives the master a domestic jurisdiction; which, however, is to be exercised with the same regard to conscience, as a public jurisdiction. So Seneca, as before; and again, he compares a slave to a subject, and says that, though by a different title, the same things only are lawful in the one case as in the other; which is especially true with regard to this right of taking away life, and what approaches to it. *Our ancestors,* says Seneca, *regarded a house as a small republic:* so Pliny. Cato the Censor, if any slave was supposed to have committed a capital

servis respublica quædam et quasi civitas, domus est. Cato Pag. 349 A. Censorius, narrante Plutarcho, si quis servus capital admisisse videretur, de eo supplicium non sumebat, nisi postquam damnatus esset, etiam conservorum judicio. Quicum conferenda verba Job. xxxi. 13, et deinceps.

IV. Sed et circa minores pœnas, puta verbera in servos, adhibenda est æquitas, imo et clementia. *Non opprimes eum,* [e]*non dominaberis ei dure,* ait lex divina de servo Hebræo, quod nunc prolata vi proximitatis ad omnes servos debet extendi[3], Deut. xv. 17, 45, 53. Ad quem locum sic [f]Philo: θεράποντες τύχῃ μὲν ἐλάττονι κέχρηνται, φύσεως δὲ τῆς αὐτῆς μεταποιοῦνται τοῖς δεσπόταις· τῷ δὲ θείῳ νόμῳ κανὼν τῶν δικαίων ἐστὶν, οὐ τὸ τύχης, ἀλλὰ τὸ τῆς φύσεως ἐναρμόνιον. διὸ προσήκει τοὺς κυρίους μὴ κατακόρως χρῆσθαι ταῖς ἐξουσίαις κατὰ τῶν οἰκετῶν, ἀλαζονείαν καὶ ὑπεροψίαν καὶ δεινὴν ὠμότητα ἐπιδεικνυμένους. ταῦτα γὰρ οὐκ ἔστι δείγματα ψυχῆς εἰρηνικῆς, ἀλλ' ὑπ' ἀκρασίας τὸν ὑπεύθυνον (male editum ἀνεύθυνον) κολαζούσης κατὰ τυραν-

e *Non dominaberis ei dure*] Vide Mosem de Kotzi præceptis jubentibus 147, 175, 178. et *collationem legum Mosis et Romanarum* titulo III. Priscus in excerptis legationum ubi Romanos barbaris præfert: ἄμεινον δὲ καὶ τοῖς οἰκέταις διατελοῦσι Ῥωμαῖοι χρώμενοι. πατέρων γὰρ ἢ διδασκάλων εἰς αὐτοὺς ἔργα ἐπιδείκνυνται. ἐφ' ᾧ τῶν φαύλων ἀπεχομένους, μετιέναι ἅπερ αὐτοῖς φαῦλα νενόμισται, σωφρονίζουσι σφὰς ἐπὶ τοῖς ἁμαρτήμασιν, ὥσπερ τοὺς οἰκείους παῖδας. οὐδὲ γὰρ οὐδ' αὐτοῖς θάνατον, ὥσπερ Σκύθαις, ἐπάγειν θέμις. ἐλευθερίας δὲ τρόποι παρ' αὐτοῖς πλεῖστοι, ἣν οὐ μόνον περιόντες, ἀλλὰ καὶ τελευτῶντες χαρίζονται, διατάττοντες κατὰ τῆς περιουσίας ὃν βούλονται τρόπον· καὶ νόμος ἐστιν, ὥσπερ ἕκαστος τελευτῶν περὶ τῶν προσηκόντων βουλεύσοιτο· *multo melius servos suos Romani tractant, patrumque aut magistrorum in eos funguntur officio: nam ut eos abstrahant ab iis quæ moribus ipsorum illicita habentur, ita eos delinquentes quasi filios suos castigant: neque enim jus est eos occidere, ut apud Scythas. Tum vero libertatis complura genera, quam non viventes tantum sed in mortis tempore domini largiuntur: qui quidquid morituri de re sua statuerint, id legis vim habet.* (Pag. 47. *Ed. Hæschel.*) Adde *legem Wisigotthicam* Lib. VI. tit. V. c. 12.

[3] Heic etiam voluit dicere Auctor, Levit. xxv. 17, 43, 53. pro eo quod habent omnes Editiones. Et hinc patet, non a Typographis ortum esse mendum illud, quum in duobus locis diversis ita constanter unus Liber Mosis pro alio

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offense, did not punish him, till he had been condemned by the judgment of his fellow-servants. See Job xxxi. 13, *If I did despise the cause of my man-servant,* &c.

IV. And even with regard to smaller punishments, as stripes to servants, we must apply equity, and even clemency. The Hebrew law says, Deut. xv. 17, 45, 53, *Thou shalt not oppress him nor rule him*

νικῆν δυναστείαν· Servi fortuna quidem inferiores sunt: natura autem pares dominis: ac divinæ legi justi regula est, non quod fortunæ, sed quod naturæ congruit. Ideo non oportet dominos potestate sua in servos proterve uti, nec eam materiam sumere superbiæ et insolentiæ et diræ feritati. Hæc enim signa animi non placidi sed male temperati, et in subditos tyrannico quodam dominatu sævientis. Numquidnam æquum est, ait Seneca, *gravius homini et durius imperari quam imperatur animalibus mutis? atqui equum non crebris verberibus exterret dominandi peritus magister: fiet enim formidolosus et contumax, nisi eum tactu blandiente permulseris.* Et mox: *quid stultius quam in jumentis quidem et canibus erubescere iram exercere, pessima autem conditione sub homine hominem esse?* Hinc est quod Hebræa lege servo aut ancillæ [g]non pro oculo tantum sed et pro dente excusso, per injuriam scilicet, libertas debebatur.

De Clem. i. 16.

Cap. 17.

Exod. xxi. 26, 27.

V. 1 Sed et [h]operæ cum modo exigendæ sunt, et valetudinis servorum humane habenda ratio. Quod ipsum præter

laudatus fuerit, numerusque Capitis eodem modo permutatus. *J. B.*

[f] *Philo*] *De Specialibus Legibus* secundo. (Pag. 798 C.) Cyprianus *ad Demetrianum: nisi tibi pro arbitrio tuo serviatur, nisi ad voluntatis obsequium pareatur, imperiosus et nimius servitutis exactor flagellas, verberas, fame, siti, nuditate, ferro frequenter et carcere affligis, et non agnoscis miser Dominum Deum tuum, cum sic exerceas ipse in hominem dominatum.* (Pag. 188. *Edit. Fell. Brem.*)

[g] *Non pro oculo tantum, sed et pro dente excusso*] Philo dicto loco: *οὕτω γὰρ ὁ μὲν ἀνθ' ὧν ἔδρασε, διττὴν ἐκδέξεται ζημίαν, ἅμα τιμῇ καὶ τὴν ὑπηρεσίαν ἀφαιρεθείς· καὶ τρίτον ἑκατέρου τῶν λεχθέντων χαλεπώτερον, ἀναγκαζόμενος ἐν τοῖς μεγίστοις εὐεργετεῖν ἐχθρὸν, ὃν ἴσως ἤχετο κακοῦν ἀεὶ δύνασθαι· ὁ δ' ἀνθ' ὧν ὑπέμεινε παρηγορίαν ἕξει διπλῆν, οὐ μόνον ἐλευθερωθεὶς, ἀλλὰ καὶ ἀργαλέον καὶ ὠμὸν δεσπότην ἐκφυγών. sic ille pro facto duplicem pendet pœnam, amissis et operis et servi pretio: ad quæ accedit et tertium duobus istis gravius, quod cogitur in rebus maximis bene facere homini exoso et quem optasset semper vexare posse; alter autem pro malo quod pertulit duplex habebit solatium, non libertatem tantum adeptus, sed a tam fero sævoque domino exsolutus.* (Pag. 808 A. B.)

[h] *Operæ cum modo exigendæ*] Vide c. 14. in epistola episcoporum ad Ludovicum regem, quæ inserta est in *capitulare Caroli Calvi.* Seneca *Epistola* XLVII. *non tanquam hominibus, sed tanquam jumentis abutimur.* De Atheni-

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harshly, of their servants; which must now by analogy be extended to all servants. And on this Philo comments. So Seneca says, *Is it not savage and foolish to treat servants worse than brute animals?* &c. Hence by the Hebrew law, *If a man smote out the eye or tooth of a servant, he obtained his liberty.* Exod. xxi. 26.

V. 1 There is, moreover, to be moderation and regard to the

Exod. xx. 10; xxiii. 12. *Deut.* xvi. 14. Lib. v. *Ep.* 19.

alia spectat lex Hebræa in sabbathi institutione, nimirum ut laboribus aliquod daretur spiramentum. Et C. Plinii epistola ad Paulinum quæ sic incipit: *video quam molliter tuos habeas, quo simplicius confitebor tibi qua indulgentia meos tractem. Est mihi semper in animo et Homericum illud* ἑκυρὸς δὲ πατὴρ ὡς ἤπιος ἦεν, *et hoc nostrum* Paterfamilias.

Ep. xlvii.

2 In eadem voce veterum humanitatem observat et Seneca: *ne illud quidem videtis quam omnem invidiam majores nostri dominis, omnem contumeliam servis detraxerint? dominum patremfamiliæ appellaverunt,* [i]*servos familiares.* *Orat.* i. p. 5 c. Dion Prusæensis optimum regem describens: δεσπότην δὲ οὐχ ὅπως τῶν ἐλευθέρων, ἀλλὰ μηδὲ τῶν δούλων χαίρειν καλούμενον· *domini nomen adeo in homines liberos non usurpat, ut et in servos eo abstineat.* *Od.* Φ. v. 215, *et seqq.* [k]Ulysses apud Homerum servos, quos fidos reperit, apud se ait futuros eo loco quasi Telemachi filii ipsius fratres essent. *Apol.* c. 33. Tertullianus: [l]*gratius est nomen pietatis quam potestatis: etiam familiæ magis patres quam domini vocantur.* Tom. i. p. 114. Hieronymus sive Paulinus ad Celantiam: *familiam tuam ita rege et constitue ut te matrem magis tuorum quam dominam videri velis, a quibus benignitate potius quam severitate exige reverentiam.*

ensium vero in servos lenitate vide Xenophontem *de Republica Atheniensium,* (§ 9. *et seqq. Ed. Oxon.*)

[i] *Servos familiares*] Amicos Epicurus. Seneca *Epistola* cvii.

[k] *Ulysses*] Cujus paternam in se benignitatem prædicat Eumæus *Odysseæ* ξ. (vers. 138, *et seqq.*)

[l] *Gratius est nomen pietatis quam potestatis*] Notat et Cyprianus testimoniorum iii. § 82. *ad Quirinum: dominos servis, cum crediderint, mitiores esse debere;* probatque id apostoli Pauli ad Ephesios verbis: Lactantius libro v. cap. 15. *Nec alia causa est cur nobis invicem fratrum nomen impertiamur, nisi quia pares esse nos credimus. Nam cum omnia humana non corpore sed spiritu metiamur, tametsi corporum sit diversa conditio, nobis tamen servi non sunt: sed eos et habemus, et dicimus spiritu fratres, religione conservos.* Au-

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servant's health, in the work required of him. And this, among other things, is aimed at in the institution of the Hebrew Sabbath; that there may be a breathing time from labour. So Pliny, to Paulinus, speaks of their common kindness to their slaves; quoting Homer, who speaks of Priam being *always kind as a father;* and saying that he always recollects the Roman word *Paterfamilias.*

2 So Seneca judges of lessons contained in this word *paterfamilias,* and in the name for slaves, *familiares.* So Dio Prusæensis says that a good king will not like the term *master,* not only of freemen, but even of slaves. Ulysses, in Homer, says that the slaves who have

Augustinus: *Domestica pax a justis patribus ita olim administrata est, ut secundum hæc temporalia bona filiorum sortem a servorum conditione distinguerent, ad Deum autem colendum omnibus domus suæ membris pari dilectione consulerent: quod naturalis ordo ita præscribit, ut nomen patrisfamilias hinc exortum sit, et tam late vulgatum, ut inique etiam dominantes hoc se gaudeant appellari. Qui autem veri patresfamilias sunt, omnibus in familia sua, tanquam filiis, ad colendum et promerendum Deum consulunt.* Lib. xix. de Civit. Dei, c. 16.

3 Similem pietatem in voce puerorum, qua servos significabant, annotavit Servius [4] ad illud Maronis: *claudite jam rivos, pueri;* nec dissimile quod Heracleotæ servos suo Mariandynos [m] δωροφόρους, id est, *donatarios,* appellabant, ἀφαιροῦντες τὸ πικρὸν τῆς προσηγορίας, *parcentes acerbitati nominis,* ut ad Aristophanem vetus interpres Callistratus notabat. Laudat Germanos Tacitus, quibus servi tanquam coloni habebantur. Germ. c. 25. Theano in epistola: δικαία χρῆσις ἵνα μήτε διὰ τὸν κόπον κάμνωσι, μήτε ἀδυνατῶσι διὰ τὴν ἔνδειαν· Ep. 3. p. 746. Opusc. Myth. Phys. Eth. *justus mancipiorum hic est usus, ut nec præ labore deficiant, nec per egestatem impares sint ferendo.*

VI. 1 Pro opera ut diximus [n] alimenta servo debentur. *Servis,* ait Cicero, *non male præcipiunt qui ita jubent uti,* De Offic. i. 13.

gustinus *de Moribus Ecclesiæ Catholicæ* I. 30. *Tu dominis servos non tam conditionis necessitate quam officii delectatione doces adhærere. Tu dominos servis, summi Dei scilicet communis domini consideratione, placabiles, et ad consulendum quam ad coercendum propensiores facis.* Adde Isidorum Pelusiotam Lib. I. epistola 471. Repete quæ modo ex Prisco posuimus.

[4] Nihil tale video apud Servium, in hunc versum, qui est ultimus Eclogæ III. Hoc tantum alibi lego: *Utrum ergo ætate* PUEROS, *an ut ministros et familiares solemus communiter* PUEROS *vocare?* In Eclog. VI. vers. 14. *J. B.*

[m] Δωροφόρους *appellabant*] *Athenæus* VI. 18.

[n] *Alimenta servo debentur*] Sirachides XXXIII. 25. ἄρτος καὶ παιδεία καὶ ἔργα οἰκέτῃ· *Panis et disciplina et opera servo.*

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been faithful, shall be as if they were brothers of Telemachus his son. Tertullian says, *fathers rather than masters.* Jerome or Paulinus exhorts Celantia to be a mother rather than a mistress of her family. So Augustine says that masters help their servants to worship God.

3 There is a similar lesson of piety in the word *puer* for *servant,* as Servius notes. So the Heracleotes called their slaves *gift-bearers.* Tacitus praises the Germans whose servants were as tenants. Theano says that slaves should not suffer from over-labour or want.

VI. 1 In return for labour, sustenance and clothing are due to the slave. So Cicero, Aristotle, Cato, Seneca. The food allowed was

ut mercenariis: operam exigendam, justa præbenda. Aristoteles: δούλῳ μισθὸς τροφὴ, *servo pro mercede alimenta.* Cato: *familiæ ut bene sit provideto, ne algeat, ne esuriat. Est aliquid,* ait [o] Seneca, *quod dominus præstare servo debeat: ut cibaria, vestiarium.* In cibariis erant quaterni modii frumenti in mensem, quos præstitos servis Donatus auctor est. Martianus jurisconsultus esse ait quæ dominus necesse habet servo præstare, ut tunicas et similia. Damnatur ab historiis [p] Siculorum crudelitas, qui captivos Athenienses fame necabant.

i. *Œcon.* v. *De Re Rust.* c. 5. Lib. iii. *de Benef.* c. 21. *Ad Phorm.* act. 1. sc. 1. v. 9. *L.* 40. *D. de peculio.* Thuc. vii. 87. Diod. xiii. 19.

Cap. 19. *et seqq.*

2 Insuper Seneca dicto loco probat in quædam liberum esse servum, et beneficii quoque habere materiam, si quid fecerit quod servilis officii modum excedat, quod non ex imperio sed ex voluntate præstetur, ubi ex ministerio in affectum amici transitur, quod late explicat. His consentaneum est,

[o] *Seneca*] Idem *de Tranquillitate:* (cap. 8.) *familia vestiarium petit victumque.* Romani ad Bessam apud Procopium *Gotthicorum* III. χορηγεῖτε τοῖς ὑμετέροις αἰχμαλώτοις τροφὴν οὐκ ἀρκοῦσαν, οὐδὲ κατὰ τὴν κρείαν ἡμῶν ἀποχρώσαν, ἄλλ' ὥς γε ἀποζῇν διαρκῶς ἔχουσαν· *date nobis saltem ut captivis vestris alimenta, non dicam quæ sufficiant, qualia necessitas nostra desiderat, sed quæ mortem arceant.* (Cap. 17.) Chrysostomus ad Ephesios v. 21. ὅταν οὗτος μὲν τὴν σωματικὴν διακονίαν παρέχῃ, σὺ δὲ τὸ σῶμα τρέφῃς καὶ θεραπεύῃς καὶ τροφαῖς καὶ ἐνδόμασι καὶ ὑποδήμασι, καὶ οὗτος δουλείας ἐστὶ τρόπος· ὅτι ἐὰν μὴ παρέχῃς καὶ σὺ τὴν σὴν διακονίαν, οὐδὲ ἐκεῖνος τὴν ἑαυτοῦ, ἀλλ' ἔσται ἐλεύθερος, καὶ οὐδεὶς αὐτὸν ἀναγκάσει νόμος καὶ μὴ τρεφόμενον τοῦτο ποιεῖν· *ubi ille corporis ministeria exhibet, tu vero eum alis, curasque ut præter victum habeat quo induatur, quo calceetur, est et hoc servitutis quoddam genus: nam nisi et tu tuum hoc exhibeas ministerium, nec ille exhibebit suum, sed liber erit, neque ulla eum lex constringet, si non alatur, operas præstare.* (Tom. III. pag. 860. *Edit. Savil.*)

four bushels of wheat a month. Martianus the jurist speaks of the things which the master is bound to provide the slave, as clothing and the like. The cruelty of the Sicilians, who starved the Athenians, is branded in history.

2 Moreover Seneca proves that, for some purposes, the slave is free; and that he has the means of conferring benefits on his master; as, if he do anything which exceeds the measure of a slave's duty, and which proceeds, not from command, but from good-will, where there is a transition from service to the affection of a friend. With this agrees what Terence says, (in the *Phormio*) that if a slave has saved anything by living sparely, or working over-hours, it should be in a way his own. Theophilus defines the *physical means* of a slave to be a natural patrimony, as we might define *contubernium,* the coha-

ut si quid servus, quemadmodum [q]apud Terentium est, suum defraudans genium comparsit, aut succisivi temporis diligentia quæsivit, id aliquo modo sit ipsius. Non male Theophilus peculium definit οὐσίαν φυσικὴν [r]naturale patrimonium, quasi contubernium definias naturale matrimonium; sed et Ulpianus peculium dixit pusillum patrimonium. Nec refert quod peculium dominus suo arbitrio adimere potest aut minuere: neque enim quod æquum est faciet, si sine causa id faciat. Causam vero intelligo non pœnam modo, sed et domini necessitatem: nam servi utilitas utilitatibus domini subest, magis etiam quam res civium civitati. Apposite ad hanc rem [s]Seneca: *non ideo nihil habet servus, quia non est habiturus, si dominus illum habere noluerit.*

Inst. quod cum eo qui in alt. pot. L. 5. § 3. D. de pecul.

L. 7. de Ben. 4.

3 Et hinc est quod dominus non repetit, si quid servo in servitute debitum post manumissionem solvit: quia (ut Try-

L. 64. D. de cond. indeb.

p *Siculorum crudelitas*] Et Isaaci Angeli in Siculos captivos, memorante Niceta Lib. I. qui et epistolam ponit ea de re regis Siculi ad Imperatorem Græcum. (Cap. 3.)

q *Apud Terentium est*] *Phormione* actu I. sc. i. (vers. 10.)

r *Naturale patrimonium*] Eumæus *Odysseæ* Ξ. (vers. 63, 64):

Οἷά τε ᾧ οἰκῆϊ ἄναξ εὔθυμος ἔδωκεν,
Οἶκόν τε κλῆρόν τε πολυμνήστην τε γυναῖκα.

Qualia dat famulis domini prolixa voluntas,
Fœdera conjugii socialia, remque, domumque.

Ipse Ulysses *Odysseæ* Φ. Eumæo et Philætio dicit (vers. 214, 215):

Ἄξομαι ἀμφοτέροις ἀλόχους καὶ κτήματ' ὀπάσσω.
Οἰκία τ' ἐγγὺς ἐμεῖο τετυγμένα.

Vestrum utrique thori socias dabo, largiar et rem
Vicinasque domos nostræ.

Varro *de Servis: studiosiores ad opus fieri liberalius tractando, aut cibariis aut vestitu largiore, aut remissione operis, concessioneve ut peculiare aliquid in fundo pascere liceat.* (*De Re Rust.* Lib. I. c. 17.)

s *Seneca*] Ejusdem est ibidem: *Numquid dubium est quin servus cum peculio domini sit? Dat tamen Domino suo munus.*

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bitation of slaves, to be a natural matrimony: and Ulpian says the *peculium*, the slave's private store, is a little patrimony. Nor does it make any difference, that the master may, at his pleasure, take away or diminish this peculium; for if he do this without cause, he will not do what is just. And by *cause*, I here understand, not only punishment, but also the need of the master; for the advantage of the slave is subordinate to the advantage of the master, even more than the advantage of the citizens to that of the State. So Seneca, *We are not to say that the slave has nothing, because he will have nothing if the master refuse his permission.*

3 And hence it is, that the master cannot recover from the slave a debt which was due to him during his servitude, and which he paid after manumission; because, as Tryphoninus says, the distinction of

phoninus ait) debiti vel non debiti ratio in condictione naturaliter intelligitur, dominus autem servo debere naturaliter potest. Itaque sicut clientes in usum patronorum et subditos in usum regum, sic servos in usus heriles contulisse legimus, ut si filia dotanda, si captivus filius redimendus, et si quid his evenisset simile. Plinius, ut ipse in epistolis narrat, servis suis concedebat etiam quædam quasi testamenta facere, id est, dividere, donare, relinquere intra domum. Apud aliquas gentes etiam plenius quoddam res acquirendi jus servis concessum legimus, sicut servitutis plures esse gradus a nobis alibi tractatum est.

Dionys. ii. 10. *Ant. Rom.*

Lib. viii. Ep. 10.

Lib. ii. 5.

4 Ad hanc internam quam exponimus justitiam multos apud populos etiam jus illud exterius dominorum leges retraxerunt. Nam et apud Græcos servis durius habitis licebat[5] πρᾶσιν αἰτεῖν, *ad venditionem proclamare,* et Romæ ad statuas confugere, aut præsidum implorare opem contra sævitiam, vel famem, vel intolerabilem injuriam. Illud vero jam non ex jure stricto, sed ex humanitate et beneficentia

§ 2. *Inst. de his, qui sui vel al. jur.*

[5] Refert id JULIUS POLLUX, *Onomastic.* Lib. VII. cap. ii. num. 13. *Edit. Amst.* testemque laudat Aristophanem, in Ὥραις, Dramate deperdito. Vide ibi KUHNII Notam: et adde POTTER. *Archæolog. Græc.* Lib. I. cap. 10. *J. B.*

[t] *Quod servibas liberaliter*] Ita manuscripti recte. Varro narrat in Feroniæ luco dictum servis: *bene meriti sedeant servi, surgant liberi:* in quibusdam locis mos liberari servos, ubi octuplum pretii, quo emti erant, paraverunt. [Quod Auctor noster adfert heic, tamquam e VARRONE, habet id sine dubio a SERVIO, ad *Æneid.* VIII. 564.] Sed Grammaticus iste ait: *In hujus* [Fero-

indebted and not indebted, is understood according to Natural Law, and not according to Civil Law, in such an action for debt; and the master may owe a debt to the slave by Natural Law, though not by Civil Law. And accordingly, we find, that as clients have made contributions for the use of their patrons, and subjects for the use of kings, so slaves have done the same for the use of their masters; for instance, for the dowry of a daughter, the ransom of a son, or any similar object. Pliny, as he tells us in his *Epistles,* allowed his servants to make wills, and to dispose of their property within his family. In some nations, we have read of a larger right of acquiring property being conceded to slaves; as we have elsewhere said, that there are several degrees of slavery.

4 In many nations, the laws have reduced that external right of masters to this internal justice which we are expounding. For among the Greeks, when slaves were harshly treated, they were allowed *to demand their sale:* and at Rome, to fly to the statues for refuge,

veniet, interdum tali quæ et debeatur, ut post longas operas aut valde magnas libertas detur servo.

5 Posteaquam jure gentium servitus invasit, secutum est beneficium manumissionis, ait Ulpianus. Exemplo sit illud Terentianum: *L. 4. D. de just. et jure.* *Andr.* i. 1, 10, 11.

Feci e servo ut esses libertus mihi
Propterea [t]quod servibas liberaliter.

Salvianus in usu quotidiano esse ait, ut servi, etsi non optimæ, saltem non improbæ servitutis, libertate donentur: addit, *et illa quæ in servitute positi conquisierant ex dominorum domo tollere non vetantur.* Cujus benignitatis multa exempla in martyrologiis apparent. Et hic quoque laudanda benignitas legis Hebrææ, quæ servum Hebræum certo tempore exacto manumitti omnino jubet, [u]nec sine donis: de cujus legis contemtu graviter queruntur prophetæ. Catonem majorem reprehendit Plutarchus quod servos senectute confectos venderet, immemor ejus quæ est inter homines communis naturæ. Lib. iii. *Adv. Avarit.* c. 7. p. 273. *Deut.* xv. 13. *Vit. M. Cat.* p. 338

VII. Quæstio hic incidit, an fugere fas sit ei qui bello Silv. *verb. servit.* § 3. Fortun. *in l.* 4. *D. de just. et jur.* Ægid. Reg. *de act. sup. disp.* 31, *dub.* 7. n. 119. Less. *l.* II. *c.* 5. *dub.* 5.

niæ] *templo* [non autem *luco*] *Tarracinæ sedile lapideum fuit, in quo hic versus incisus erat:* BENEMERITI, &c. *Quam libertatem* [legendum *libertatis*] *deam dicit* Feroniam, *quasi* Fidoniam. Igitur non dicit Servius, versum illum referri a Varrone, sed tantum ab illo etymologiam tradi vocis Feroniæ. Vide hunc, *De Ling. Lat.* Lib. IV. pag. 20. *Ed. II. Steph.* [Ceterum de re ipsa consule quæ habet V. Cl. EVER. OTTO, Præfat. in Tom. II. *Thesauri Juris*, pag. 4. *J. B.*]

[u] *Nec sine donis*] Consuetudo id interpretata ne minus XXX. siclis detur: vide præcepto jubente 84.

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or to implore the help of magistrates against cruelty or starvation, or intolerable wrong. This is a matter, not of strict law, but of humanity and kindness: and sometimes this makes the slave's liberty his due, after long or very great labours.

5 When Slavery was introduced by the Law of Nations, the benefit of Manumission was added, says Ulpian. So in Terence, the slave is made a freedman, for serving liberally. Salvian says that slaves have often their liberty given, and are allowed to take with them their property. Of this kindness, we have many examples in the martyrologies. And here, we must praise the kindness of the Hebrew law; which directed that the Hebrew slave was, after a certain time, to be absolutely manumitted, and "not empty," Deut. xv. 13: of the neglect of which law the prophets complain heavily. Plutarch condemns Cato the Elder, because he sold his slaves when past work, thus disregarding the common bond of human nature.

VII. The question here occurs, whether he who is taken prisoner

justo captus est: non de eo agimus, qui suo proprio delicto pœnam eam est commeritus, sed qui publico facto in hanc fortunam decidit. Verius est fas non esse, quia ex conventione, ut diximus, gentium communi operas suas civitatis nomine debet. Quod tamen ita est intelligendum, nisi intolerabilis sævitia hanc ipsi imponat necessitatem. Videri circa hanc rem potest responsum Gregorii Neocæsariensis XVI.

Lib. ii. 5. VIII. 1 Movimus alibi dubitationem, an et quatenus nati ex servis domino teneantur interno jure, quæ hic ob specialem bello captorum considerationem omitti non debet. Si parentes suo delicto pœnam mortis erant commeriti, poterunt eorum posteri qui sperabantur, ob[6] vitam servandam obstringi servitio, quia alioqui exstituri non fuerant: nam et ob alimenta alioquin defutura prolem suam parentes in servitutem vendere possunt, ut ibi diximus. Tale est jus quod in Cana-
Deut. xx. 14. næorum posteros Hebræis Deus concedit.

2 Pro debito autem civitatis ii quidem qui jam nati erant,

[6] In omnibus Editionibus, etiam prima, heic legebatur *ad.* Sed nos audacter posuimus *ob,* quod sensus manifesto postulat. Neque enim agitur de obligatione quadam vitæ servandæ, quæ ipsis natis e Servo incumbat, sed de obligatione serviendi, qua tenentur ob vitam a Victore servatam. Sic in sequenti periodo *ob alimenta* a Domino præstanda proles a Parentibus in servitutem dari posse dicitur. *J. B.*

[7] Heic etiam, in omnibus Editionibus, hactenus legebatur, *largientibus,* mendo manifestissimo. Videtur Auctor primo scripsisse, *ex legibus civilibus dominis plus æquo largientibus:* postea, quum, ad vitandum concursum duplicis casus similis ejusdem numeri, unum e

in war may justifiably make his escape. We do not here speak of him who has merited such punishment by crime, but who has been brought into the condition by some public event. The truer opinion is, that the step is not justifiable; because, as we have said, by the common convention of nations, he owes his labour on the part of the State. Which, however, is to be understood, with the provision that intolerable cruelty do not impose on him such a necessity. See on this subject the Response of Gregory XVI.

VIII. 1 We have elsewhere discussed the question, whether, and how far, children, born of slaves, are bound to the master by internal justice; and this question ought not to be omitted in its especial bearing on prisoners of war. If the parents had, by crime, deserved the penalty of death, their prospective posterity might be bound to slavery, as a condition of life spared, because otherwise they would not have come into existence: for parents may sell their children into slavery, on account of the want of sustenance which would otherwise fall upon them, as we have said. Such was the right

ut pars civitatis obligari poterant, non minus quam parentes ipsi; at in nondum natis non videtur hæc causa sufficere, sed alia requiri: aut ex parentum consensu expresso, accedente alendi necessitate, idque etiam in perpetuum: aut ex ipsa alimentorum præstatione, idque duntaxat usque dum operæ totum quod impensum est expunxerint. Si quid ultra juris in hos domino datur, id videtur ex lege civili dominis plus æquo largiente [7] procedere.

IX. 1 At quas apud gentes jus illud servitutis ex bello in usu non est, optimum erit permutari captivos: proximum dimitti pretio non iniquo. Hoc quale sit præcise definiri non potest: sed humanitas docet non ultra intendi debere quam deducto ne egeat captus rebus necessariis: nam et leges civiles hoc multis indulgent qui suo facto proprio in debitum inciderunt. Alibi hoc pactis aut moribus definitur: [x] ut apud [8] Græcos olim mina, nunc inter milites menstruo stipendio. Narrat Plutarchus olim inter Corinthios et Megarenses bella

plurali singularem facere vellet, perspicuitatis caussa; *ex lege civili* posuit, sed oblitus est τὸ *largientibus* simul, ut par erat, mutare. *J. B.*

[x] *Ut apud Græcos olim mina*] Bello Gallorum cum Hispanis in Italia eques redemtus quarta parte annui stipendii: non comprehensi qui ordines ducerent eisque superiores: nec qui justo prælio aut oppido per vim capto venirent in potestatem. *Mariana* xxvii. 18.

[8] Nullus dubito, quin Auctor in animo habuerit quod legerat apud Aristotelem, οἷον τὸ μνᾶς λυτροῦσθαι. *Ethic. Nicom.* Lib. v. cap. 10. *Verum* hoc ibi tantum refertur ut exemplum *Juris*, quod Philosophus vocat *Legitimum*, quodque opponit *Naturali:* nihil

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which God granted to the Hebrews over the posterity of the Canaanites.

2 And those who were already born, might be liable for the debt of the State, as being part of the State, no less than their parents. But this cause does not seem sufficient, in those who are not yet born; some other seems necessary; either the express consent of the parents, added to the necessity of providing sustenance for them, and that, for ever; or the actual supply of sustenance, and that holds only till they have worked off the whole expense of their maintenance. If any right beyond this is given to the master, it seems to proceed from a Civil Law, too liberal to masters.

IX. 1 Where this right of servitude arising from war is not established by use, it will be the best course to exchange the prisoners; and next to that, to let them be ransomed at a reasonable rate. What this is, cannot be precisely defined: but humanity teaches us that it should not be stretched so far that it leaves the prisoner without the necessaries of life. For even the Civil Law

Quæst. Gr. p. 295 B. gesta ἡμέρως καὶ συγγενικῶς, *mansuete et ita ut populos consanguineos decebat.* Si quis captus esset, eum a captore habitum ut hospitem et fide de pretio accepta dimissum domum: unde natum δορυξένων nomen.

De Offic. i. 12. 2 Excelsioris animi est illud Pyrrhi a Cicerone laudatum:

[y] Nec mi aurum posco, nec mi pretium dederitis:
Ferro non auro vitam cernamus utrique:
Quorum virtuti belli fortuna pepercit
Eorundem libertati me parcere certum est.

Non dubium quin crediderit Pyrrhus justum a se bellum geri: tamen parcendum existimabat eorum libertati, quos probabiles causæ in bellum tulissent. Simile Cyri factum celebrat Xenophon: Philippi Macedonis post victoriam in Chæronea Polybius: Alexandri in Scythas Curtius: Ptolemæi regis et Demetrii, inter se non bello magis quam in captivos benignitate certantium, Plutarchus. Lysimachum vero [z] Getarum rex Dromichætes bello captum hospitem suum fecit, paupertatisque simul Geticæ ac comitatis testem factum perpulit ut talibus amicis, quam hostibus uti mallet.

Xen. iii. *Cyrop.* c. 1. § 20. Lib. v. 10. Lib. vii. 9. n. 18. *Vit. Dem.* p. 891. [[Strabo, Lib. vii. p. 302.]]

dicit, nec Aristoteles, nec Andronicus Rhodius in Paraphrasi, nec Michael Ephesius, unde colligi queat, hoc lege quadam communi sancitum esse apud Græcos. Immo video, in oratione Demosthenis *de male obita Legatione,* Captivos quosdam mutuo sumsisse, alium *tres minas,* alium *quinque,* alium prout cuique conditiones erant propositæ: Ὁ μὲν, τρεῖς μνᾶς, ὁ δὲ, πέντε, ὁ δὲ, ὅπως συνέβαινεν ἑκάστῳ, τὰ λύτρα. Pag. 222 A. *J. B.*

[y] *Nec mi aurum posco*] Similem Tiberii Christiani Imperatoris in Persas bonitatem laudat Menander Protector, (Legat. pag. 141. 1. *Ed. Hæschel.*) Sisebuti Mariana, item Sanctii Castellæ regis, libro xi. (cap. 5. Illud autem de Sisebuto legitur Lib. vi. cap. 3.)

[z] *Getarum rex Dromichætes*] Meminit et Diodorus Siculus in *Excerptis Peirescianis.* (Pag. 257, 258.)

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grants this indulgence to many who have come into debt by their own act. In other cases, this is determined by law or custom; as anciently, among the Greeks, the ransom was set at a mina, and among soldiers, at a month's pay. Plutarch says that the Corinthians and Megareans carried on war humanely. Captives were reckoned as the guests of their captors, and dismissed on their promise.

2 More lofty in spirit is what Cicero quotes of Pyrrhus (*Off.* I. 12); so Cyrus; Philip, after Chæronea; Alexander, towards the Scythians; Ptolemy and Demetrius contending in generosity to prisoners, as in arms. Dromichætes, king of the Getæ, made Lysimachus his prisoner, his guest, and a witness of the poverty and equity of the Getæ, and thus gained him as his friend.

CAPUT XV.

TEMPERAMENTUM CIRCA ACQUISITIONEM IMPERII.

I. *Quatenus justitia interna permittat imperium acquiri.*
II. *Laudabile esse hoc jure in victos abstinere.*
III. *Sive eos miscendo victoribus:*
IV. *Sive relinquendo imperium his qui habuerant:*
V. *Interdum impositis præsidiis:*
VI. *Aut tributis etiam et similibus oneribus:*
VII. *Utilitas ab hac moderatione indicatur.*
VIII. *Exempla: et de mutata forma reipublicæ apud victos.*
IX. *Imperium si assumendum sit, recte partem ejus victis relinqui.*
X. *Aut certe libertatem aliquam.*
XI. *Præcipue in religione.*
XII. *Saltem victos clementer haberi oportere: et cur?*

I. QUÆ in singulos aut exigitur æquitas aut laudatur humanitas, tanto magis in populos aut in populorum partes, quanto in multos insignior est et injuria et beneficentia. Justo bello ut alia acquiri possunt, ita et jus imperantis in populum, et jus quod in imperio habet ipse populus: sed nempe quatenus fert aut pœnæ nascentis ex delicto, aut alterius debiti modus. Quibus addenda est causa vitandi periculi summi. Sed hæc causa plerumque cum aliis miscetur, quæ tamen ipsa tum in pace constituenda, tum in utendo victoria maxime spectanda est. Nam cetera est ut remittantur ex misericordia: in publico autem periculo, quæ modum excedit securitas, immisericordia est. Isocrates ad Philippum: τῶν βαρβάρων

Vict. *de jure belli*, n. 38 et 59.

Epist. ii. p. 409 A.

CHAPTER XV. *Restraints respecting Conquest.*

I. Equity, which is required, and humanity, which is praised, towards individuals, are the more requisite and praiseworthy, towards nations and parts of nations, inasmuch as the injury or kindness is greater with the number. Now as other things may be acquired in a just war, so may imperial authority over a people, and the right which the people itself has in the government: but only so far as is limited, either by the nature of a penalty arising from delict, or by the nature of some other debt. To which is to be added, the reason of averting extreme danger. This last cause is commonly mixed up with others; but is, in reality, to be much regarded for its own sake, both in establishing peace and in using victory. For other things may be remitted out of compassion; but in a public danger, a disre-

ἐπὶ τοσοῦτον ἐξαρκέσει κρατεῖν, ὅσον ἐν ἀσφαλείᾳ καταστῆσαι τὴν σαυτοῦ χώραν· barbari hactenus edomandi sunt, quantum satis erit ut tuam regionem in tuto colloces.

Cat. Bell. c. 12.

II. 1 Crispus Sallustius de Romanis veteribus: *majores nostri religiosissimi mortales nihil victis eripiebant, præter injuriæ licentiam.* Digna quæ a Christiano diceretur sententia: quicum illud ejusdem convenit: *sapientes pacis causa bellum gerunt, et laborem spe otii sustentant.* Aristoteles non semel dixerat, *πόλεμον εἶναι εἰρήνης χάριν, ἀσχολίαν δὲ σχολῆς, bellum pacis et negotium otii causa institutum.* Nec aliud vult Cicero, cujus hoc est sanctissimum effatum: *bellum ita suscipiatur, ut nihil aliud nisi pax quæsita videatur.* Ejusdem et hoc simile: *sic suscipienda bella sunt ob eam causam, ut sine injuria in pace vivatur.*

De Rep. ord. fragm. vi. 40. p. 118.
De Rep. v. 1. c. 14 et 15. et x. *Ethic. Nic.* c. 7.
De Offic. i. 23.
Ibid. c. 11.

2 Nihil hæc distant ab his quæ nos docent veræ religionis theologi, finem belli esse amovere ea quæ pacem perturbant. Ante Nini tempora, ut ex Trogo alibi dicere cœpimus, fines imperii [a] tueri magis quam proferre mos erat: intra suam cuique patriam regna finiebantur: reges non imperium sibi, sed populis suis gloriam quærebant, contentique victoria imperio

Thom. *a.* 2. *q.* 40. *art.* 1. *ad.* 3. Wil. Mat. *de bell. sec. requis. q.* 7. Just. i. 1.

[a] *Tueri magis quam proferre*] Alexander Imperator Artaxerxi Persæ: *δεῖν μένειν τε αὐτὸν ἐν τοῖς ἰδίοις ὅροις καὶ μὴ καινοτομεῖν, μηδὲ ματαίαις ἐλπίσιν αἰωρούμενον μέγαν ἐγείρειν πόλεμον· ἀγαπητῶς δὲ ἔχειν ἕκαστον τὰ ἑαυτοῦ· manendum cuique intra suos fines nihil novando, neque debere quemquam incerta spe sublatum bella incipere, sed suo esse contentum.* [Habet hoc Auctor noster

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gard of the danger which goes beyond the just limit, is want of compassion. Isocrates tells Philip that he must master the barbarians, so as to place his own territory in security.

II. 1 Sallust says of the old Romans: *Our ancestors, the most religious of men, took from the vanquished nothing but the licence of wrong-doing;* words worthy of having been said by a Christian: and with them agrees what is also said by the same writer: *Wise men bear labour in the hope of rest, and make war for the sake of peace.* So Aristotle also says: and so Cicero, in several places.

2 To the same effect is the teaching of Christian theologians, that the end of war is to remove the hinderances to peace. Before the time of Ninus, as we before said, following Trogos, it was rather the habit to defend than to extend the boundaries of empires: every one's rule ended with his own country; kings did not seek empire for themselves, but glory for their peoples, and content with victory, abstained from empire. And to this point, Augustine brings us back, when he says: *Let them consider that it is not the part of good men to*

abstinebant: quo nos retrahit quantum potest Augustinus, cum ait: *videant tamen ne forte non pertineat ad viros bonos* [b]*gaudere de imperii latitudine:* qui et hoc addit: *felicitas major est vicinum bonum habere concordem, quam vicinum malum subjugare bellantem.* Adde quod in ipsis Ammonitis propheta Amosus severe reprehendit hoc studium proferendorum per arma finium.

De Civ. Dei, iv. 15.

Cap. i. 13.

III. Ad hoc antiquæ innocentiæ exemplar proxime accessit veterum Romanorum prudens modestia: *Quid hodie esset imperium*, ait Seneca, *nisi salubris providentia victos permiscuisset victoribus? Conditor noster Romulus*, ait apud Tacitum Claudius, *tantum sapientia valuit, ut plerosque populos eodem die hostes, deinde cives habuerit:* addit exitio Lacedæmoniis et Atheniensibus nihil aliud fuisse quam quod victos pro alienigenis arcebant. Livius rem Romanam auctam dicit hostibus in civitatem recipiendis. Exempla exstant in historiis Sabinorum, Albanorum, Latinorum, deinde aliorum ex Italia: donec postremo *Cæsar Gallos in triumphum duxit, idem in curiam.* Cerialis in oratione ad Gallos quæ apud Tacitum: *ipsi plerumque legionibus nostris præsidetis:*

L. ii. *de Ira*, c. 34.

Ann. xi. 24.

Lib. viii. 13.

Suet. *in Cæs.* c. 80.

Hist. iv. 74.

ex HERODIANO, Lib. VI. cap. ii. num. 9. *Ed. Bœcleri:* ubi, ut et in aliis Editionibus, legitur: ἐν τοῖς τῶν ἰδίων ὅροις· neque necesse est emendare: ἐν τοῖς ἰδίοις, ut facit Auctor noster, sive ex incogitantia, sive data opera. *J. B.*]

[b] *Gaudere de imperii latitudine*] Vide Cyrillum libro v. contra Julianum, reges Hebræos hoc nomine laudantem, quod suis contenti essent finibus. (Pag. 177 E. *Ed. Spanh.*)

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rejoice in the extent of empire; and again: *It is a greater felicity to have a good neighbour at peace, than to conquer a bad neighbour in war.* The prophet Amos severely rebukes the Ammonites who had committed atrocities *that they might enlarge their border.* Amos i. 13.

III. To this pattern of ancient innocence, the nearest approach was made in the prudent moderation of the old Romans. *What would our empire be at this day,* says Seneca, *except a wholesome prudence had mixed the conquered with the conquerors?* And, *Our founder Romulus,* Claudius says in Tacitus, *carried his wisdom so far, that most of the peoples with whom he had to do were, on the same day, first his enemies, and then his citizens.* He adds, that nothing was more destructive to the Lacedæmonians and Athenians, than that they treated as strangers those they conquered. So Livy says that the Roman power was increased, by taking enemies into the composition of the state. There are, in history, the examples of the Sabines, Albans, Latins, and others in Italy: until at last *Cesar triumphed over*

ipsi has aliasque provincias regitis; nihil separatum clausumve. Et mox: *proinde pacem et vitam, quam victi victoresque eodem jure obtinemus, amate, colite.* Tandem, quod mirandum maxime, in orbe Romano qui sunt, ex constitutione Imperatoris Antonini cives Romani effecti sunt, quæ verba sunt Ulpiani; ex eo, ut Modestinus ait, Roma communis patria est. Et de ea Claudianus:

L. in orbe 17. *D. de stat. hom.* *L. Rom.* 33. *D. ad mun.* *In Sec. Cons. Stilic.* vv. 154, 155.

> Hujus pacificis debemus moribus omnes,
> Quod cuncti gens una sumus.

IV. 1 Alia moderatæ victoriæ species est, victis aut regibus, aut populis relinquere quod habuerant imperium. Sic Hercules, Priami:

Sen. *Troad.* v. 725, *et seqq.*

> Hostis parvi victus lacrymis,
> Suscipe, dixit, rector habenas,
> Patrioque sede celsus solio:
> Sed sceptra fide meliore tene.

Idem, victo Neleo, filio ejus Nestori regnum permisit. Sic Persæ reges victis regibus regnum relinquebant. Sic Cyrus Armenio. [c] Sic Poro [1] Alexander. Laudat hoc [d] Seneca, *nihil ex rege victo præter gloriam sumere.* Et Polybius celebrat Antigoni bonitatem, qui cum Spartam haberet in potestate,

Ælian. *Var. Hist.* iv. 5. Herod. iii. 15. Xen. *Cyrop.* iii. 1. *De Clem.* i. 21. Lib. v. 9.

c *Sic Poro Alexander*] Pipinus Aistolfo Langobardo. [Vide EGINARD. *de Vit. Carol. Magn.* cap. vi. pag. 39, 40. cum Notis ult. Editionis. *J. B.*]

1 Vide QUINT. CURTIUM, Lib. VIII. cap. xiv. num. 45. ibique Pitisci notam 100. in Edit. 3. *J. B.*

d *Seneca*] Totus locus dignus inspici, ubi et hoc egregie dictum: *hoc est etiam ex victoria sua triumphare, testarique se nihil quod dignum esset victore apud victos invenisse.* Tigrani

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the Gauls; and he who did this gave them votes. Cerialis says, in his oration to the Gauls, in Tacitus, *You yourselves for the most part command our legions; you govern those provinces; nothing is kept from you or barred against you;* and further: *Do you then further and cultivate peace and safety which we conquerors and conquered alike hold by the same right.* At last, by a very remarkable law* of the Emperor Antonine, all the inhabitants of the Roman empire were made Roman citizens, as Ulpian tells us; and so, as Modestinus says, Rome was the common country of all.

IV. 1 Another kind of moderated victory is, to leave to conquered kings or peoples the authority which they had. So Hercules professes, in Seneca, to have done to Priam; so he gave Neleus the kingdom of his father Nestor; so the Persian kings let conquered kings keep their kingdoms: so Alexander did to Porus. Seneca

* A very bad law, says Gronovius; as if any one were to declare all rustics to be nobles.

reliquerit ipsis τὸ πάτριον πολίτευμα καὶ τὴν ἐλευθερίαν, *rempublicam majorum ac libertatem:* quo ex facto maximas per Græciam laudes consecutus ibidem narratur.

2 Sic Cappadocibus permissum a Romanis uti qua vellent reipublicæ forma: et multi populi post bellum relicti liberi. *Carthago libera cum suis legibus est,* aiunt Rhodii ad Romanos post bellum Punicum secundum. Pompeius τῶν εἰλημμένων ἐθνῶν τὰ μὲν αὐτόνομα ἠφίει, inquit Appianus, *ex devictis gentibus* [e] *quasdam reliquit liberas.* Et Quintius Ætolis dicentibus pacem firmam esse non posse, nisi Philippus Macedo regno pelleretur, dixit, sententiam eos dixisse immemores Romanorum moris, victis parcendi: addidit: *adversus victos mitissimum quemque maximum animum habere.* Apud Tacitum est: *Zorsini victo nihil ereptum.*

Liv. xxxvii. 54. *Mith. Bell.* p. 251. Liv. xxxiii. 12. *Ann.* xii. 19.

V. Interdum simul cum concessione imperii consultum victorum securitati. [f] Sic a Quintio decretum, Corinthus redderetur Achæis, ut in Acrocorintho tamen præsidium esset: Chalcidem ac Demetriadem retineri, donec cura de Antiocho decessisset.

pars regni a Pompeio relicta. Eutropius VI. (c. 11.)

[e] *Quasdam reliquit liberas*] Earum ut noscatur conditio vide Polybium excerptis legationum num. 19. Suetonium in Cæsare ubi de Gallia. (Cap. 25.) Habet et quædam Guillimannus non indigna lectu in rebus Helvetiorum. (Lib. I. c. 8.)

[f] *Sic a Quintio decretum*] Remissum id tamen postea. Polybius excerptis legationum num. ix. Plutarchus *Flaminio.* (Pag. 374.)

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praises this *taking from conquered kings nothing but glory.* And Polybius celebrates the goodness of Antigonus, who, having Sparta in his power, left them the constitution and liberty of their forefathers; and on this account obtained great praise through all Greece.

2 So the Romans allowed the Cappadocians to have what constitution they liked; so Carthage was left free; so Pompey left some conquered nations free. And Quintius, when the Etolians said that peace could not be lasting except Philip were deprived of his kingdom, told them they forgot the Roman habit of sparing the vanquished: and added that great men were mild to conquered enemies. So Zorsines is treated in Tacitus.

V. Sometimes, while authority to govern is granted, provision is made for the security of the conquered. So Quintius restored Corinth to the Achæans, but with the reservation, that there should be a garrison in Acrocorinthus: and that Chalcis and Demetrias should be kept, till the anxiety about Antiochus was past.

VI. Tributorum quoque indictio sæpe non tam ad factorum sumtuum restitutionem, quam ad securitatem et victoris
L. 1. *ad Qu. frat. ep.* 1. num. 11. et victi in posterum pertinet. Cicero de Græcis: *simul illud Asia cogitet, nullam a se neque belli externi; neque discordiarum domesticarum calamitatem abfuturam fuisse, si hoc imperio non teneatur: id autem imperium cum retineri sine vectigalibus nullo modo possit, æquo animo parte aliqua suorum fructuum pacem sibi sempiternam redimat atque*
Hist. iv. 74. *otium.* Petilius Cerialis apud Tacitum pro Romanis apud Lingonas aliosque Gallos sic disserit: *nos quanquam toties lacessiti jure victoriæ id solum vobis addidimus quo pacem tueremur: nam neque quies gentium sine armis, neque arma sine stipendiis, neque stipendia sine tributis haberi queunt.*
Lib. ii. 15. § 7. Eodem pertinent et alia quæ expressimus cum de inæquali fœdere ageremus, [g] tradere arma, classem, elephantos, non habere arcem, non exercitum.

VII. 1 Ut autem victis relinquatur suum imperium, non tantum humanitatis est, sed sæpe et consilii. Inter Numæ in-
Plut. *quæst. Rom.* 15. p. 267 c. stituta laudatur, quod a Termini sacris omnem sanguinem abesse voluit: significans ad quietem et certam pacem nihil
Lib. iv. 12. n. 29. utilius quam suis se finibus tenere. Optime Florus: *difficilius*

[g] *Tradere arma, classem*] Vide de Persis Agathiam libro iv. (cap. 5.)

[h] *Calanus Indus*] Habet id Plutarchus *Alexandro.* [Pag. 701 E.]

[i] *Comparatione testudinis*] Plutarchus sic narrat: Ἀχαιοὺς σφετεριζομένους τὴν Ζακυνθίαν νῆσον ἀποτρέπων ἔφη, κινδυνεύσειν, ἂν, ὥσπερ αἱ χελώ-

VI. The imposition of a tribute often has reference, not so much to the restitution of the expenses incurred, as to the future security both of the victor and the vanquished. So Cicero says of the cities of Asia, that they owe their security to the Roman empire, and ought to be content to pay taxes for its support, as the price of peace and ease. So Cerialis, in Tacitus, tells the Gauls, that *the Romans, though so often provoked, had only taken the means of keeping peace: for there is no quiet among nations without armies; no armies without pay; no pay without taxes.* To this pertain what we have elsewhere said of unequal leagues, where one party gives up fleets, fortresses, &c.

VII. 1 That the vanquished should retain their power of governing, is often, not only a measure of humanity, but of prudence. Numa directed that the rites of Terminus should not include blood in their celebration: implying, that to keep our own boundaries, is the way to live in peace. So Florus says, *It is more difficult to retain provinces than to make them; they are gained by force, they are kept by right.* So Livy: *It is easier to gain them one by one than to keep all.* And so, the

est provincias obtinere quam facere: viribus parantur, jure retinentur: cui non dissimile apud Livium illud: *facilius parari singula quam teneri universa:* et Augusti dictum apud Plutarchum: *μεῖζον ἔργον τοῦ κτήσασθαι μεγάλην ἡγεμονίαν, τὸ διατάξαι τὴν ὑπάρχουσαν.* Darii regis legati Alexandro: *Periculosum est peregrinum imperium: difficile est continere quod capere non possis.... Facilius est quædam vincere quam tueri: quam hercule expeditius manus nostræ rapiunt quam continent.*

Lib. xxxvii. 35.

Apophtheg. p. 207 D.

Curt. iv. 11.

2 Quod [h]Calanus Indus et ante eum Œbarus Cyri amicus explicabant corii similitudine, quod alia parte se tollat simul aliam pede presseris: et T. Quintius apud Livium [i]comparatione testudinis, tutæ ad ictus ubi collecta in suum tegmen est, obnoxiæ atque infirmæ simul exseruerit sui partem. Plato III. de legibus huc aptat Hesiodi dictum: *omni dimidium plus.* Et Appianus notat non paucos populos qui sub Romano imperio esse vellent ab ipsis repudiatos: aliis etiam reges datos. Scipione Africano judice, jam suis temporibus tantum Roma possidebat, ut avidum esset quicquam ultra appetere: abunde felix si nihil ex eo quod obtinebat amitteret. Itaque et lustri condendi carmen, quo Dii rogabantur ut res populi Romani

Apud Arist. *Orat. de Rom.* Tom. I. p. 353, 354.

Liv. xxxvi. 32.

Pag. 690 E. Tom. II.

In Præfat.

Val. Max. iv. 1. n. 10.

ναι, πορρωτέρω τὴν κεφαλὴν τῆς Πελοποννήσου προτείνωσι· Achæos Zacynthum insulam appetentes cum dehortari vellet, dixit periculum eos adituros, si testudinis more caput extra Peloponnesum extulissent. (*Vit. Flamin.* pag. 378 D.)

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saying of Augustus in Plutarch; that *ordering a great government is a greater work than acquiring it.* So the ambassadors of Darius to Alexander.

2 This was what Calanus, and before him Œbarus, expressed by the similitude of a dried hide, which rises in one part, when you tread down another: and T. Quinctius, in Livy, by the comparison of a tortoise, which is secure against blows when gathered within its shell, but exposed and tender when it puts out any member. So Plato applies Hesiod's *half greater than the whole.* And Appian notes that many peoples, which wished to be under the Roman empire, were rejected: while others had kings set over them. At the time of Scipio Africanus, in his judgment, the possessions of Rome were so wide, that it was greedy to wish for more; and happy if they lost nothing. And he altered the lustral lay which was sung on the taking of each census, and which prayed the gods to make Rome's fortunes better and greater; so that the prayer was made to be, that they might be kept ever free from harm.

meliores amplioresque facerent, [k]ita emendavit, precatus ut eas perpetuo incolumes servarent.

VIII. Lacedæmonii, et initio Athenienses, in captas civitates nullum sibi vindicabant imperium: tantum eas republica uti volebant ad suam accommodata, Lacedæmonii quidem sub primorum potentia, Athenienses sub arbitrio populi, ut Thucydides, Isocrates, Demosthenes nos docent, ipse etiam Aristoteles quarti de republica capite XI. et quinti VII. Quod ipsum in comœdia sic notat Heniochus illorum temporum scriptor:

Thucyd. i. 19. Isoc. *Panath.* p. 243 D. Dem. *orat. de Chers.* Diod. xiii. et xv. Apud Stob. *Serm.* 43.

Γυναῖκε δ' αὐτὰς δύ' ἐταράττετόν τινε,
Ἀεὶ συνοῦσαι. δημοκρατία θατέρᾳ
Ὄνομ' ἐστὶ, τῇ δ' ἀριστοκρατία θατέρᾳ,
Δι' ἃς πεπαρῳνήκασιν ἤδη πολλάκις.

Tum geminæ ad illas accesserunt mulieres
Quæ cuncta conturbarunt: optimatitas
Est nomen alteri, alteri popularitas,
Quarum incitatu pridem externatæ fuerunt.

Ann. vi. 42.

Simile est quod Tacitus ab Artabano narrat Seleuciæ factum: *plebem primoribus tradidit*, inquit, *ex suo usu: nam populi*

[k] *Ita emendavit*] Utitur hac historia Claudianus Julianus consul in epistola *ad Pupienum et Balbinum.* (Capitolin. in Maxim. et Balbin. c. 17.) Imitatus Augustus qui Dione narrante, ἐπῃνεῖτο ἐφ' οἷς οὐκ ἠξίου ἕτερόν τι προσκτήσασθαι, ἀλλ' ἀκριβῶς ἀρκεῖσθαι τοῖς ὑπάρχουσιν ἐδικαίου· *laudatus est quod nihil novi acquirere voluit, sed quæ jam habebantur sufficere est arbitratus.* [Lib. LIII. pag. 602 C. *Ed. H. Steph.* ubi tamen verba prima aliter sese habent, Auctore nostro memoriter illa adferente. *J. B.*]

[2] Intelligit Auctor noster τὰ Ἀπομνημονεύματα Μουσωνίου τοῦ φιλοσόφου, scripta a Pollione; de quibus SUIDAS, voce Πολλίων. Vide JONSIUM, *De Scriptoribus Hist. Philos.* III. 7. Unde autem petitum sit fragmentum illius Operis, in quo verba ab Auctore nostro adlata extant, quum hactenus ig-

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VIII. The Lacedæmonians, and at first the Athenians, claimed no authority over the cities which they had conquered: only they required them to have a constitution like their own; the Lacedæmonians, an aristocracy, the Athenians, a democracy, as we learn from Thucydides, Isocrates, Demosthenes, and Aristotle. Of these two characters who constantly disturbed Greece, Aristocracy and Democracy, an old comedian, Heniochus, speaks, as women. So Artabanus, in Tacitus, established an aristocracy at Seleucia. Whether such changes add to the victor's security, is not a matter for our consideration.

IX. In the cases in which it is not safe to abstain from all authority over the conquered, still the portion assumed may be limited, so

imperium juxta libertatem, paucorum dominatio regiæ libidini propior est. Sed ejusmodi mutationes an ad victoris securitatem faciant, non est nostræ inspectionis.

IX. Si minus tutum sit omni in victos imperio abstinere, temperari tamen res potest, ut aliquid imperii relinquatur ipsis aut ipsorum regibus. Populi Romani consuetudinem vocat Tacitus ut haberet *instrumenta servitutis et reges.* Eidem *Agric.* c. 14. *Antiochus inservientium regum ditissimus:* βασιλεῖς Ῥωμαίων ὑπήκοοι, [2] in commentariis de Musonio: et apud Stra- *Hist.* ii. 81. bonem circa finem libri sexti. Pag. 288. Lucanus, *Phars.* vii. 228.

Atque omnis [l] Latio quæ servit purpura ferro.

Sic apud Judæos mansit sceptrum in Synedrio, etiam post confiscationem Archelai. Evagoras Cypri rex, ut apud Dio- Lib. xv. 9. dorum est, dicebat velle se Persæ obedire, sed ut regem regi. Et Dario victo aliquoties hanc conditionem ferebat Alexander, Lib. xvii. 54. [m] ut ipse imperaret aliis, pareret Alexandro. Nos de modis miscendi imperii diximus alibi. Quibusdam pars regni relicta, Lib. i. 3. § 17. sicut veteribus possessoribus agrorum pars. Lib. iii. 8. 3.

X. Sed et cum omne imperium victis eripitur, relinqui

norassem, reperi forte apud Stobæum, *Serm.* xlvi. pag. 336. *init.* ubi refertur egregia oratio Musonii ad Regem quemdam Syriæ. Et quamvis neque heic, nec alibi, in illis Collectaneis, quod quidem sciam, dicta Musonii, tamquam e Commentariis Pollionis, laudentur; merito tamen inde petita conjicit noster. *J. B.*

[l] *Latio quæ servit purpura ferro*] Vide Panegyricum Maximiano dictum (a *Claudian. Mamertino.* c. 10.)

[m] *Ut ipse imperaret aliis, pareret Alexandro*] Tales et olim in Italia reges sub aliorum regum imperiis: Servius ad x. *Æneid.* (vers. 655.) Sic apud Æschylum *Persis* (pag. 126. *Ed. H. Steph.*):

Βασιλεῖς βασιλέως ὕποχοι μεγάλου·
Reges regis magni subices.

Sic et apud Turcas, teste Leunclavio libro xviii.

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that some authority may be left to them, or their kings. Tacitus speaks of it as the custom of the Romans *to have kings as the instruments of their rule:* and calls Antiochus *the richest of subject kings.* So Musonius [in Stobæus, see J. B.'s note], Strabo, Lucan. So among the Jews, the sceptre remained in the Sanhedrim, even after the confiscation of Archelaus. So Evagoras of Cyprus was willing to obey the Persian king, as one king another. And after Darius was conquered, for some time Alexander offered him the condition that he should govern others and obey Alexander. We have spoken elsewhere of mixed empire. In some cases, a part of the kingdom is left to the vanquished, as a part of the lands to the old possessors.

X. Even when all authority is taken from the vanquished, they

illis possunt circa res privatas et publicas minores [n] suæ leges suique mores et magistratus. Sic in Bithynia proconsulari provincia Apamæa civitas privilegium habuit [o] suo arbitrio rempublicam administrandi, ut Plinii epistolæ nos docent, et alibi, Bithynis sui magistratus, suus senatus. Sic et in Ponto Amisenorum civitas legibus suis utebatur Luculli [3] beneficio. Gotthi victis Romanis leges reliquerunt Romanas.

Lib. x. *epist.* 56. *Ibid. Epist.* 84. 113. *Idem, ibid. Ep.* 93. et 111.

XI. 1 Hujus indulgentiæ pars est [p] avitæ religionis usum victis nisi persuasis non eripere: quod ut victis pergratum ita victori innoxium probat Agrippa oratione ad Caium, quam Philo recitat in legationis suæ renunciatione. Et apud Josephum, tum ipse Josephus, tum Titus Imperator rebellibus Hierosolymitis objiciunt, quod Romanorum beneficio sacris suis tanto cum jure uterentur, ut templo alienigenas arcere possent, etiam capitis periculo.

Pag. 1032, *et seqq.* *Bell. Jud.* v. 9, 4; vi. 2, 1. *Ibid.* vi. 2, 4.

2 At si falsa apud victos religio, ne vera opprimatur,

[n] *Suæ leges*] Philo legatione *ad Caium:* Σεβαστὸς τοσαύτην ἐποιεῖτο τῆς βεβαιώσεως τῶν παρ' ἑκάστοις πατρίων, ὅσην καὶ τῶν Ῥωμαϊκῶν ἐπιμέλειαν· *Augustus non minus curæ suæ duxit custodiam legum propriarum cuique genti quam Romanorum* [Pag. 1014 B. Vide de hoc loco Ampliss. BYNCKERSHOEK. ad *L.* Ἀξίωσις, *D. De Leg. Rhod.* pag. 90. *J. B.*]

[o] *Suo arbitrio rempublicam administrandi*] Vide epistolam XCIII Plinii, et sequentem Trajani libro x. Sinope sub Persis rempublicam habebat popularem. Appianus *Mithridaticis.* (pag. 228.) Talis apud Græcos sub Romanis umbra libertatis. Vide Ciceronem Lib. VI. *ad Atticum,* epist. I. Plinium Lib. VIII. epist. 24. Evocari ex insula Cyprios non licebat. Cicero *ad Atticum* V. 21. [De *Amiso,* non de *Sinope,* loquitur Appianus, ut inspicienti patebit. *J. B.*]

[3] Id narrat APPIANUS, *De Bell. Mithrid.* pag. 228. *Edit. H. Steph. J. B.*

[p] *Avitæ religionis usum*] *Melius est ibi aliquem Deum coli quam nullum;* ut

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may be allowed to retain their own laws with regard to public and private property, their own customs and magistrates. So in Bithynia, which was a proconsular province, Apamea had the privilege of governing itself in its own way: as we learn from Pliny: *the Bithynians have their own magistrates, their own senate.* So the Ameni in Pontus, by the good office of Lucullus [from Appian, J. B.] The Goths left to the conquered Romans the Roman law.

XI. 1 It is a part of this indulgence, to permit the use of their own religion to the conquered, except so far as they are persuaded to change. And that this is both a great boon to the conquered, and no harm to the conqueror, is proved in the oration of Agrippa to Caius, given by Philo. And both Josephus and Titus object to the rebellious Jews, that they were allowed the practice of their own religion, so far as to be authorized to exclude strangers from the

recte curabit victor: quod Constantinus fecit fractis Licinii partibus, et post eum Franci aliique reges.

XII. 1 Postrema cautio hæc est, ut in imperio etiam plenissimo et quasi herili victi clementer habeantur, et ita ut eorum utilitates cum victoris utilitatibus socientur. Cyrus victos Assyrios jubebat bono esse animo: eandem ipsorum sortem fore quæ fuisset, mutato tantum rege: mansuras ipsis domos, agros, jus in uxores, in liberos, ut fuisset hactenus quin si quis injuriam ipsis faceret, se ac suos vindices fore. Apud Sallustium legimus: *populo Romano melius visum amicos quam servos quærere: tutiusque rati* [q]*volentibus quam coactis imperitare.* Britanni temporibus Taciti delectum ac tributa et injuncta imperii munera impigre obibant, si injuriæ abessent: has ægre tolerabant: jam domiti ut parerent, nondum ut servirent.

Xen. *de Cyri inst.* iv. 4. n. 3.

Jug. Bell. c. 109.

Vit. Agr. c. 13.

2 Privernas ille in senatu Romano interrogatus, qualem

Severi verbis modo diximus. Sic Gotthi apud Procopium *Gotth.* II. (c. 6) dicunt se ad suam religionem adegisse neminem. [Quod de Severo dicit heic Auctor, retulit supra, ad cap. 12. § 6. ex Lampridio, c. 49: ubi paullo aliter verba se habent. *J. B.*]

[q] *Volentibus quam coactis imperitare*] Lacedæmonii apud Thucydidem: *νομίζομέν τε τὰς μεγάλας ἔχθρας μάλιστ' ἂν διαλύεσθαι βεβαίως, οὐκ ἢν ἀνταμυνόμενός τις καὶ ἐπικρατήσας τὰ πλέω τοῦ πολέμου, κατ' ἀνάγκην ὅρκοις ἐγκαταλαμβάνων, μὴ ἀπὸ τοῦ ἴσου ξυμβῇ, ἀλλ' ἢν παρὸν τὸ αὐτὸ δρᾶσαι, πρὸς τὸ ἐπιεικὲς καὶ ἀρετῇ αὐτὸς* [leg. *αὐτὸν*] *νικήσας παρὰ ἃ προσεδέχετο, μετρίως ξυναλλαγῇ· sic existimamus, magnas inimicitias ita in firmam concordiam mutari, non si quis se ulciscens et fortuna usus prosperiore necessitatem alteris imponat jurandi in leges inæquales, sed si cum id facere possit, æquitate usus non minore quam in vincendo virtute, quam potest moderatissime rem transigat.* (Lib. IV. c. 19.)

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temple, even on pain of death.

2 But if the vanquished profess a false religion, the victor will do well to take care that the true religion be not subjected to oppression: which Constantine did, when he had broken the party of Licinius; and after this, the Frank kings and others.

XII. 1 The last caution is this: that even in the most absolute and despotic government, the conquered are treated with clemency, so that their utility be joined with the utility of the victor. So Cyrus told the conquered Assyrians to be of good cheer, for they had only changed their king, and would keep all their rights and property, and be protected therein. So Sallust, of the Roman treatment of those they vanquished. So Tacitus says, that the Britons in his time paid their tribute readily, if no injury was added to it: they would be subjects, but not slaves.

2 The Privernate ambassador, when asked what peace the Romans

ab ipsis pacem Romani exspectandam haberent: *si bonam* Liv. viii. 21. *dederitis*, ait, *et fidam et perpetuam; si malam, haud diuturnam:* [4]ratione addita: *ne credideris ullum populum, aut hominem denique, in ea conditione, cujus eum pœniteat, diu-* Liv. viii. 13. *tius quam necesse sit mansurum.* Sic Camillus dicebat, firmissimum imperium esse quo obedientes gaudeant. Scythæ Curt. vii. 8. Alexandro: *inter dominum et servum nulla amicitia: etiam in pace: belli tamen jura servantur.* Hermocratus apud Lib. xiii. 19. p. 341. Diodorum: *κάλλιόν ἐστι τοῦ νικᾷν τὸ τὴν νίκην ἐνεγκεῖν ἀνθρωπίνως· non tam vincere pulchrum quam victoria cle-* *Ann.* xii. 19. *menter uti.* Salubris ad victoriæ usum Taciti sententia: *bellorum egregii fines, quoties ignoscendo transigitur.* In Cæsaris Dictatoris [5]epistola: *hæc nova sit ratio vincendi, ut misericordia et liberalitate nos muniamus.*

[4] Non ipse Privernas Legatus hanc rationem addidit, sed *pars melior Senatus* ita responsum, in meliorem partem, interpretata est. *J. B.*

[5] Epistola illa reperitur apud Ciceronem, Lib. ix. *ad Attic.* post Epist. 8. *J. B.*

might expect from them, answered, *If you give us a good one, you will have a faithful and perpetual one; if a bad one, a short one.* And the reason was added, that nobody will stay longer than he can help, in a condition which he thinks bad. So Camillus said, that the firmest government was that which the subjects were glad to obey. The Scythians told Alexander, that between master and slave, there is no friendship: even in peace, the rights of war are kept up. Hermocratus says, *The glorious thing is, not to conquer, but to use victory clemently.* The maxim of Tacitus is wholesome with reference to the use of victory: *Those endings of wars are to be admired which are brought about by granting pardon.* In the epistle of the Dictator Cesar, we read, *Be this a new way of conquering; to protect ourselves with mercy and liberality.*

CAPUT XVI.

TEMPERAMENTUM CIRCA EA, QUÆ JURE GENTIUM POSTLIMINIO CARENT.

I. 1 QUOUSQUE ex bello justo res capientium fiant, diximus supra, quibus de rebus deducenda sunt quæ recipiuntur postliminii jure: sunt enim hæc pro non captis. At quæ bello injusto quæruntur restituenda diximus, nec ab iis tantum qui ceperunt, sed et ab aliis ad quos res quoquo modo pervenit: nemo enim plus juris ad alium transferre potest quam ipse habuit, aiunt juris Romani auctores quod Seneca breviter explicat, *nemo potest quod non habet dare.* Dominium internum non habuit qui primo cepit: quare nec illud habebit qui causam ab ipso obtinet: dominium ergo secundus aut tertius possessor accepit, quod docendi causa externum vocamus, id est, commodum hoc, ut ubique judiciaria auctoritate ac manu pro domino tuendus sit: quo tamen si

L. 27. § 1. D. de nox. act. l. 20. D. de acq. rer. dom. Lib. v. de *Benef.* c. 12.

CHAPTER XVI. *Restraints as to things which, by the Laws of Nations, have not the right of Postliminium.*

I. 1 How far things, which are captured in a just war, become the property of the captor, we have stated above. Of these things, those are to be excepted, which are resumed by right of Postliminium; for these are held as not captured. But what is captured in an unjust war is to be restored, as we have said; and not only by the captors, but by others, into whose hands they have anyhow come. For no one can transfer to another more of right than he himself possesses; as the Roman Jurists say: which Seneca briefly explains, *No one can give what he has not.* The first captor had not internal ownership, [just ownership;] and therefore, that *he* cannot have, who had his title from him. Therefore the second or third possessor took an ownership which, for the sake of distinction, we will call *external;* that is, he took this advantage, that he is everywhere to be protected as owner, by the sentence and authority of the judge: but

utatur adversus eum cui res malo facto erepta est, faciet non probe.

L. 27. D. de capt. 2 Nam quod de servo qui a latronibus captus mox ad hostes pervenerat responderunt jurisconsulti nobiles, verum esse eum subreptum esse, nec quod hostium fuisset aut postliminio rediisset ei rei impedimento esse: idem ex naturali jure respondendum est de eo, qui bello injusto captus, mox bello justo, aut alia ratione in alterius venit potestatem: nam in jure interno bellum injustum latrocinio nihil distat. Atque in hanc sententiam ex facto consultus respondit [a] Gregorius Neocæsariensis, cum Pontici quidam res civium a barbaris captas recepissent.

Ægid. Reg. *de act. sup. dist.* 31. *dub.* 7. *num.* 122. Can. x.

II. 1 Reddendæ ergo res tales his quibus fuerant ereptæ, quod et factum sæpe videmus. Livius cum retulisset a L. Lucretio Tricipitino victos Volscos et Æquos, expositam ait in campo Martio prædam, ut suum quisque per triduum cognitum abduceret. Idem cum narrasset, Volscos a Posthumio dictatore fusos: *prædæ pars sua cognoscentibus Latinis atque Hernicis reddita: partem sub hasta dictator vendidit.* Alibi: *biduum ad recognoscendas res datum dominis.* Idem ubi Samnitium de [1] Campanis victoriam narraverat; *quod lætissimum victoribus fuit, captivorum recepta septem millia*

Lib. iii. 10. Lib. iv. 29. Lib. v. 16. Lib. x. 20.

[a] *Gregorius Neocæsariensis*] Sequuntur Petr. *de potestate principis* c. 3. quæst. 4. Bruningius *de Homagiis* concl. 241.

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if he use this right against him who lost the property by an unjust act, he will not do rightly.

2 The answer which was given by illustrious jurists, respecting a slave who, captured by robbers, had afterwards made his way to the enemy, [and was then captured from them, and exposed for sale. *Gronov.*] namely, that it was true, that he had been stolen, and that his having been in the hands of the enemy, or having returned by postliminium, was no obstacle to that view; is the same answer which we must give respecting him who, being captured in an unjust war, afterwards by just war, or in any other way, comes into the possession of another: for in internal justice, an unjust war does not differ from a robbery. And to this effect responded Gregory of Neocesarea, being consulted in reference to the case, when certain men of Pontus had received into their possession property of the citizens captured by barbarians.

II. 1 Such property, then, is to be restored to them from whom it was taken: and we see that this has often been done. Livy, after mentioning that the Volsci and Equi were conquered by L. Lucretius

et quadringenti: præda ingens sociorum: accitique edicto domini ad res suas noscendas recipiendasque præstituta die. Mox simile recitat factum Romanorum: *Samnites Interamnam coloniam Romanorum occupare conati urbem non tenuerunt: agros depopulati cum prædam aliam inde mixtam hominum atque pecudum colonosque captos agerent, in victorem incidunt consulem ab Luceria redeuntem, nec prædam solum amittunt, sed ipsi longo ac impedito agmine incompositi cæduntur. Consul Interamnam edicto dominis ad res suas noscendas recipiendasque convocatis, exercitu ibi relicto, comitiorum causa Romam est profectus.* Alibi de præda agens, quam ad Ilipam Lusitaniæ urbem Cornelius Scipio ceperat, sic ait idem scriptor: *ea omnis ante urbem exposita est, potestasque dominis res suas cognoscendi facta: cetera vendenda quæstori data: quod inde effectum est, militi divisum.* Post pugnam T. Gracchi ad Beneventum: *præda omnis, præterquam hominum captivorum, militi concessa est, et pecus exceptum est quod intra triginta dies domini cognovissent,* eodem Livio auctore.

Cap. 36. Lib. xxxv. 1. Lib. xxiv. 16.

2 De L. Æmilio Gallorum victore Polybius τὴν λείαν ἀπέδωκε τοῖς προσήκουσι, *prædam iis reddidit a quibus* Hist. ii. 31.

[1] Immo Romanorum de Samnitibus, qui agrum Campanorum populabantur. Inspice locum, a me in ora libri distincte designatum. *J. B.*

Tricipitinus, says that the booty was exposed three days in the Campus Martius, that each person might know and take his own. And when he has related that the Volscians were defeated by Posthumius the dictator; he adds, *The part which belonged to the Latins and Hernici was given them back on their recognizing it: a part was sold by auction;* and elsewhere, *Two days were given for owners to know and recover their property.* And when he has related the victory of the Samnites [no, the Romans, J. B.] over the Campanians, he adds, the most joyful part of the victory was, that 7500 captives were recovered; and a great booty of the allies: and by a public notice, owners were summoned to take back their own property. And soon after he relates a similar act of the Romans, at Interamna, when they had conquered the Samnites. So at Ilipa in Lusitania. So T. Gracchus at Beneventum gave the owners of cattle thirty days to recognize their stock in the booty.

2 So Polybius says that L. Emilius, when he had conquered the Gauls, restored the spoil to those from whom it had been taken. So Scipio did, when, having taken Carthage, he found there many pre-

Plut. *Apoph.* p. 200 B. *Bell. Pun.* p. 83. *abacta fuerat.* [b]Idem fecisse Scipionem Plutarchus et Appianus narrant, cum Carthagine capta multa ibi invenisset donaria, quæ e Siciliæ urbibus et aliunde Pœni eo advexerant. *In Verr.* ii. 35. Cicero Verrina de jurisdictione Siciliensi: *oppidum Himeram Carthaginienses quondam ceperant, quod fuerat imprimis Siciliæ clarum et ornatum. Scipio qui hoc dignum populo Romano arbitraretur, bello confecto socios sua per nostram victoriam recuperare, Siculis omnibus, Carthagine capta, quæ potuit, restituenda curavit.* Idem late satis id ipsum Liv. xxxi. 15. Scipionis factum prosequitur Verrina de signis. Rhodii naves quatuor Atheniensium captas a Macedonibus recuperatasque Atheniensibus reddiderunt. Sic Phaneas Ætolus restitui Liv. xxxiii. 13. Ætolis æquum censebat quæ ante bellum habuissent. Nec negabat T. Quinctius, [c]si de urbibus bello captis ageretur, et Strabo xiv. p. 642. societatis leges non rupissent Ætoli. Etiam bona, olim con-

[b] *Idem fecisse Scipionem Plutarchus et Appianus narrant*] Etiam Diodorus Siculis *Excerptis Peirescianis.* (Pag. 345.) Et Valerius Maximus Lib. v. cap. i. num. 6. *Africani quoque posterioris humanitas speciose lateque patuit. Expugnata enim Carthagine circa Siciliæ civitates literas misit, ut ornamenta templorum suorum Pœnis rapta per legatos recuperarent, inque pristinis sedibus reponenda curarent.*

[c] *Si de urbibus bello captis ageretur*] Pompeius Attalo et Pylæmeni Paphlagoniam reddidit. Eutropius VI. (c. 11.) In federe Pontificis, Imperatoris Caroli V. et Venetorum contra Solimannum convenerat, ut possessa quisque reciperet. Paruta VIII. itaque Cephalenia ab Hispanis capta reddita Venetis. Est ad eam rem pertinens locus et in Anna Comnena, ubi de Gothofredo agit. (Lib. XI. c. 6.)

[d] *Vir non pii tantum animi, sed et excelsi*] Bene hoc notavit Jacchiades *ad Danielem* v. 17. Sulpitius Severus *de Abrahamo: reliqua his quibus erepta*

sents which had been made by the cities of Sicily and others, and carried thither. Cicero, in his oration against Verres, speaking of the Sicilian jurisdiction, says that *Scipio when he had taken Carthage, restored to the Sicilian allies what had been taken by the Carthaginians at Himera, thinking it right that, by the Roman victory, they should recover their property.* And he follows out this subject, this deed of Scipio's, in his oration against Verres on the works of art. The Rhodians restored to the Athenians four ships of theirs, which had been taken by the Macedonians. So Phaneas the Etolian thought it just that there should be restored to the Etolians what they had had before the wars. And T. Quinctius did not deny that this would have been right, if the question had been of cities captured in war, and if the Etolians had not broken the truce. Even the treasures consecrated to the gods at Ephesus, which the kings had appropriated, the Romans restored to their ancient state.

III. 1 But if such an article of property should have come into any one's possession by traffic, can he charge the person from whom

secrata Ephesi, quæ reges sua fecerant, Romani in veterem statum restituerunt.

III. 1 Quod si commercio res talis ad aliquem pervenerit, poteritne is ei, cui res fuit erepta, pretium a se numeratum imputare? consentaneum est his, quæ alibi diximus, posse imputari, in quantum ipsi qui rem amiserat valitura fuerat desperatæ possessionis recuperatio. Quod si tale impendium repeti potest, quidni et æstimatio laboris ac periculi, perinde ac si quis rem alienam in mari perditam urinando eduxisset? Apposita ad hanc quæstionem mihi videtur historia Abrahami cum quinque regum victor Sodoma rediret: וישב את כל הרכש ait Moses, *Reduxit omnes illas res:* nempe quas a regibus captas superius narraverat. Gen. xiv. 16.

2 Nec alio referenda conditio regis Sodomorum quam fert Abrahamo, ut captivos redderet, cetera sibi retineret pro labore et periculo. At ipse Abrahamus [d] vir non pii tantum Com. 20, 21, 22, 23, 24.

erant reddidit. (*Hist. Sacr.* Lib. I. c. 5.) Ambrosius Lib. I. *de Patriarcha Abraham: ideo quoniam sibi mercedem ab homine non quæsivit, a Deo accepit.* (Cap. 3.) Non multum hinc distant facta Pittaci et Timoleontis: *Pittacus Mitylenæus cum recuperati agri dimidia pars consensu omnium offerretur, avertit animum ab eo munere, deforme judicans virtutis gloriam magnitudine prædæ minuere.* Valerius Maximus libro VI. cap. V. num. 1. *De Timoleonte* Plutarchus, οὐ τὸ λαβεῖν ἐκ τοιούτων αἰσχρὸν, ἀλλὰ τὸ μὴ λαβεῖν κρεῖττον, καὶ περιουσία τῆς ἀρετῆς ἐν οἷς ἔξεστιν ἐπιδεικνυμένης τὸ μὴ δεόμενον· *non accipere in talibus turpe, sed non accipere melius, et virtutis cujusdam exuberantis, et in iis quæ licita sunt ostendentis, se et his carere posse.* (Pag. 277 B.) Confer quæ supra Lib. II. c. xiv. § 6. et hoc libro c. iv. § 1. [Auctor, in hac Nota, conjungit Pittacum et Timoleontem, quasi utriusque *factum* esset. At vero Timoleon plane contrarium fecit, ut patebit inspicienti locum PLUTARCHI,

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it had been taken with the price which he has paid? It is agreeable to the principles which we have elsewhere laid down, that it may be charged, at such a rate as the recovery of the possession would be worth, considering that he may have despaired of such recovery. But if such expenses may be charged, why not also the estimated value of the labour and danger; just as if any one should, by diving, recover a treasure belonging to another, which had been lost in the sea? Apposite to this question seems to me the history of Abraham, when he had conquered the five kings and returned to Sodom: Moses says (Gen. xiv. 16), *He brought back all the goods*, namely, those which he had before spoken of as being taken by the four kings, Chedorlaomer, &c., and from the five kings of Sodom, &c. (v. 11).

2 And to the same practice we must refer the conditions which the king of Sodom proposes to Abraham, that he should give up the captives, and keep the goods for his labour and danger (v. 21). Abra-

animi, sed et excelsi, sibi quidem nihil voluit sumere: ceterum de rebus receptis (nam ad eas, ut diximus, spectat ista narratio) quasi suo jure decumam Deo dedit, detraxit sumtus necessarios, et sociis suis partem aliquam tribui voluit.

IV. Sicut autem res domino reddendæ sunt, [e]ita et populi et partes populorum his qui jus imperii habuerant, aut etiam sibi, si sui fuerant juris ante vim injustam. Ita Sutrium re-
Liv. vi. 3. ceptum restitutumque sociis, Camilli ævo, ex Livio discimus.
Xen. *Hist. Gr.* ii. 2. § 5. Æginetas et Melios suis urbibus restituerunt Lacedæmonii
Liv. xxxiii. 32; xxxiv. 58. Græciæ civitates, quas Macedones invaserant, a Flaminio redditæ libertati. Idem et in colloquio cum Antiochi legatis æquum esse censuit liberari Asiæ urbes quæ Graii essent nominis, quas Seleucus Antiochi proavus bello ceperat, amissas receperat idem Antiochus: *neque enim in Æolidem Ioniamque coloniæ in servitutem regiam missæ sunt*, aiebat, *sed*

unde verba quædam heic adferuntur. *J. B.*]

e *Ita et populi*] Exules Saguntini post sex annos a Romanis restituti. Antoninus Cassii bello in servitutem redactos liberos esse jussit, bona dominis reddi. Sic Calatrava militibus, quibus erepta a Mauris erat, reddita a rege Castellæ aliisque. Mariana Lib. XI. (cap. 25.) Confer quæ supra hoc libro cap. X. § 6. [Nescio unde Auctor habeat, quæ de Saguntinis exsulibus, et de

ham indeed, a man not only pious but magnanimous, refused to take anything for himself (v. 23): but from the property restored (for those are the goods spoken of) he gave a tenth to God, he deducted the expenses of the young men, and requested a portion to be given to his allies.

IV. As property is to be restored to its owner, so too are peoples and parts of peoples to be restored to those who had rightful authority over them; or to themselves, if they had been their own masters, before the unjust violence. Thus Sutrium was recovered and restored to the allies, at the time of Camillus. The Eginetans and Melians were restored to their cities by the Lacedæmonians: the Greek cities which had been invaded by the Macedonians were restored to liberty by Flaminius. And the same general, in his conference with the ambassadors of Antiochus, urged that is was just that the cities in Asia which were of the Grecian race, and which Antiochus had recovered, should be made free; for that *Greek colonies were not sent into Æolia and Ionia to be slaves to the king, but to extend the race, and to diffuse over the earth the Greek nation.*

V. A question is sometimes raised, concerning the length of time by which the internal obligation of restoring a thing may be extinguished. This question, between citizens of the same government, is to be determined by their own laws: (provided such laws recognize

stirpis augendæ causa, gentisque vetustissimæ per orbem terrarum propagandæ.

V. Solet et de temporis spatio quæri, quo reddendæ rei obligatio interna possit exstingui. Sed hæc quæstio inter ejusdem imperii cives definienda est ex legibus ipsorum; (si modo illæ internum jus concedunt, non in externo solo consistunt: quod ex verbis et proposito legum prudenti inspectione colligendum est:) inter eos vero qui alii aliis externi sunt, ex sola conjectura derelictionis, de qua diximus alibi, quantum Lib. ii. 4. instituto nostro sufficit.

VI. Quod si valde ambiguum sit jus belli, optimum erit [f]Arati Sicyonii consilium sequi, qui partim novis possessoribus Cic. Off. ii. 23. persuasit ut pecuniam accipere mallent, possessionibus cederent; partim veteribus dominis, ut commodius putarent numerari sibi quod tanti esset quam suum recuperare.

captis in bello Avidii Cassii, heic refert. Circa priores, aliquid reperies apud Livium, Lib. xxviii. c. 39. in Oratione Legatorum Saguntinorum: de aliis autem in Vita M. Aurel. Antonini, a Julio Capitolino scripta, cap. 25, quanquam non ita diserte res ibi narretur, ac Auctor noster proponit. *J. B.*]

[f] *Arati Sicyonii consilium sequi*] Quod fecit rex Ferdinandus memorante Mariana Lib. xxix. c. 14.

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an internal [that is, an equitable] as well as an external [or strictly legal] right; which is to be collected from the words and design of the laws, by a careful consideration of them: but between those who are foreigners to each other, it is to be determined by a probable judgment as to dereliction: on which subject we have elsewhere said as much as is necessary for our purpose.

VI. If the right of war be very ambiguous, it will be best to follow the counsel of Aratus of Sicyon; who in part persuaded the new possessors to accept money and give up the possessions; and partly induced the old owners to be paid for what they gave up, as more convenient than to attempt to recover it.

CAPUT XVII.

DE HIS, QUI IN BELLO MEDII SUNT.

I. SUPERVACUUM videri posset agere nos de his, qui extra bellum sunt positi, quando in hos satis constet nullum esse jus bellicum. Sed quia occasione belli multa in
L. ii. 11. § 10. eos, finitimos præsertim, patrari solent prætexta necessitate, repetendum hic breviter quod diximus alibi, necessitatem, ut jus aliquod det in rem alienam, summam esse debere; requiri præterea ut ipso domino par necessitas non subsit: etiam ubi de necessitate constat, non ultra sumendum quam exigit: id est, si custodia sufficiat, non sumendum usum: si usus, non sumendum abusum: si abusu sit opus, restituendum tamen rei pretium.

II. 1 Moses cum summa ipsum et populum necessitas
Num. xx. 17, *et seqq.* urgeret transeundi per agros Idumæorum, primum ait transiturum se via regia, neque deflexurum in arva aut vineta: si vel aqua ipsorum opus haberet, persoluturum se ejus pretium.

[a] *Sine strepitu peragrantes Peloponnesum*] Par testimonium Tito Quintio Flaminio perhibet Plutarchus. (p. 371.)

[b] *De Pompeio Magno Tullius*] Et Plutarchus: ἀκούων τοὺς στρατιώτας ἐν ταῖς ὁδοιπορίαις ἀτακτεῖν, σφραγί-

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Chapter XVII. *Of Neutrals in War.*

I. It may appear superfluous for us to treat of those who are extraneous to the war, since it is evident that there are no rights of war against them. But since many liberties are often taken with them, especially when they are neighbours, on the pretext of necessity, we may here briefly repeat what we have already said:—that Necessity, in order to give a person a right to another's property, must be of the extremest kind;—that it is further requisite, that there be not a similar necessity on the part of the owner;—that even when the necessity is plain, more is not to be taken than it requires; that is, if keeping the thing is sufficient, it is not to be used; if using it is sufficient, it is not to be destroyed; if destroying it is requisite, the price is to be repaid.

II. 1 When Moses was under an extreme necessity of passing

Idem præstiterunt laudati et Græcorum et Romanorum duces. Apud Xenophontem Græci qui cum Clearcho, Persis pollicentur, nullo se damno iter facturos: et si venales commeatus præberent, neque esculenta se, neque poculenta cuiquam erepturos. *De Exped. Cyr.* ii. 3. § 12, 13.

2 Dercyllides, narrante eodem Xenophonte, *παρήγαγε τὸ στράτευμα διὰ τῆς φιλίας χώρας, μηδὲν βλάψας τοὺς συμμάχους, copias duxit per fines pacatos, ita ut nullo detrimento socii afficerentur.* *Hist. Græc.* iii. 1. § 8. Livius de Perseo rege: *per Phthiotidem, Achaiam, Thessaliamque, sine damno injuriaque agrorum per quos iter fecit, in regnum rediit.* Lib. xli. 27. De Agidis Spartani exercitu Plutarchus: *θέαμα ταῖς πόλεσιν ἦσαν, ἀβλαβῶς καὶ πρᾴως καὶ μονονοῦ καὶ ἀψοφητὶ διαπορευόμενοι τὴν Πελοπόννησον· spectaculum erant civitatibus clementer ac sine noxa et pene* [a] *sine strepitu peragrantes Peloponnesum.* *Vit. Agid.* p. 801 D. De Sulla Velleius: *putares venisse in Italiam, non belli vindicem, sed pacis auctorem: tanta cum quiete exercitum per Calabriam Apuliamque cum singulari cura frugum, agrorum, urbium, hominum, perduxit in Campaniam.* Lib. ii. 25. [b] De Pompeio Magno Tullius: *cujus legiones sic in Asiam pervenerunt, ut non modo manus tanti exercitus, sed nec vestigium quidem cuiquam pacato nocuisse dicatur.* *Pro lege Manil.* c. 13. De Domitiano ita Frontinus: *cum in finibus Ubiorum castella poneret, pro fructibus eorum locorum, quæ vallo comprehendebat, pretium* Lib. ii. *strat.* c. 11. n. 7.

δα ταῖς μαχαίραις αὐτῶν ἐπέβαλεν· ἣν ὁ μὴ φυλάξας, ἐκολάζετο· cum audisset milites suos per itinera licentiosius agere, sigillum gladiis eorum apposuit: quod qui non custodisset, is puniebatur. (Pag. 624 A.)

with the people through the land of the Edomites, (Num. xx. 17,) he says, first, that he will go by the king's highway, and will not turn aside into the fields or vineyards; and that even if he have to drink of the water of the wells, he will pay the price of it. The same was done by Greek and Roman generals, who are mentioned with praise. So the Greeks, in Xenophon, who were with Clearchus, promise the Persians that they will pass without doing any mischief: and that if they supply them with food to purchase, they will not take by force meat or drink.

2 So Dercyllides acted, according to Xenophon: Perseus in Phthiotis, &c.; Agis in Peloponnesus; Sulla in Calabria and Apulia; Pompeius in Asia; Domitian in the country of the Ubii; Severus in his Parthian expedition; the Goths, Huns, and Alans of Theodosius's army, of which latter the Panegyrist says; *There was no tumult, no*

solvi jussit, atque ea justitiæ fama omnium fidem sibi adstrinxit. De Parthica Alexandri Severi expeditione Lampridius: *tanta disciplina, tanta reverentia sui egit, ut non milites, sed senatores transire dicerentur: quacumque iter milites faciebant, tribuni accincti, centuriones verecundi, milites amabiles erant: ipsum vero ob hæc tot et tanta bona provinciales ut Deum suscipiebant.* [c]De Gotthis, Hunnis, Alanis qui Theodosio merebant Panegyrista: *nullus tumultus, nulla confusio, nulla direptio ut a barbaris erat; quin si quando difficilior frumentaria res fuisset, inopiam patienter ferebat, et quam numero arctaret annonam comparcendo laxabat.* Stiliconi Claudianus idem tribuit:

Cap. 50.

Latin. Pacat. c. 32. *Paneg. vet.* xii.

In 1 Cons. Stilich. Lib. i. v. 162, *et seqq.*

Tanta quies, jurisque metus servator honesti
Te moderante fuit, nullis ut vinea furtis
Aut seges erepta fraudaret messe colonum.

[d]Et Belisario Suidas.

[c] *De Gotthis*] Multa de hujus gentis modestia habemus apud Cassiodorum, ut v. 10, 11, 13. Eodem autem libro epistola 26. *Nec possessorum segetes aut prata vastetis, sed sub omni continentia properate: ut grata nobis esse vestra occursio possit. Quia ideo exercituales gratis subimus impensas, ut ab armatis custodiatur intacta civilitas.* Lib. ix. 25. *Arma ejus nulla possessorum damna senserunt.*

[d] *Et Belisario Suidas*] Sæpe hanc in Belisario virtutem prædicat comes ejus testisque actionum Procopius. Vide egregiam ejus orationem huc pertinentem, quam ad milites habuit prope Siciliam, cum in Africam tenderet, narrationemque itineris per Africam *Vandalicorum* primo. (Cap. 12. et 17.) Ex *Gotthicorum* autem iii. integrum hunc locum apponam: εἰς δὲ τοὺς ἀγροίκους ἔτι τοσαύτῃ φειδοῖ καὶ προνοίᾳ ἐχρῆτο, ὥστε βιασθῆναι μὲν αὐτῶν οὐδένα πώποτε, στρατηγοῦντος Βελισαρίου, τετύχηκε· πλουτεῖν δὲ παρὰ δόξαν ξυνέβαινε πᾶσιν, οἷς ἂν αὐτὸς ἐπιδημοίη στρατιᾶς πλήθει. ἀπεδίδοντο γὰρ αὐτοῖς κατὰ γνώμην τὰ ὤνια πάντα. καὶ ἡνίκα μὲν ἀκμάζοι τὰ λήϊα ἐς τὸ ἀκριβὲς διεφύλαττε, μήτινα παροῦσα ἡ ἵππος λυμήνηται· τῶν δὲ ὡραίων ἐν τοῖς δένδροις ὄντων ἅψασθαι αὐτῶν οὐδενὶ τὸ παράπαν ἐξουσία ἐγίνετο· *adversus agricolas tanta cura providentiaque agebat, ut eorum nemo vim pateretur, exercitum ducente Belisario: contra vero opulenti fierent omnes quocunque ille cum multo milite advenisset: vendebant enim illi militibus res suas suopte arbitratu: et cum maturæ essent*

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confusion, no plunder, as you might expect from barbarians. If the supply of provisions was at any time more difficult, they bore the deficiency with patience, and made up for the scarcity by spare diet. Claudian ascribes the same merit to Stilico, and Suidas to Belisarius.

3 This was brought about by an exact care in the supply of necessaries, punctual pay, and vigorous discipline, of which you find the rule in Ammianus: *The lands of neutrals are not to be trampled:* and in Vopiscus: *Let no one take a fowl which is not his, or touch a sheep;*

3 Hoc præstabat exacta cura [e]provisus rerum necessariarum, et bene soluta stipendia, et vigor disciplinæ, cujus legem audis [f]apud Ammianum: *pacatorum terras non debere cal-* Lib. xviii. p. 205.
cari. Et apud Vopiscum: *memo pullum alienum rapiat:* Aurel. c. 7.
ovem nemo contingat, uvam nullus auferat, segetem nemo deterat, oleum, sal, lignum nemo exigat. Item apud Cassio- Var. vii. 4.
dorum: *vivant cum provincialibus jure civili: nec insolescat animus qui se sentit armatum: quia clypeus ille exercitus nostri quietem debet præstare paganis.* His accedat illud Xenophontis *Expeditionis* libro VI. μὴ ἀναγκάζειν πόλιν φι- Cap. 2. § 4.
λίαν ὅ, τι μὴ αὐτοὶ ἐθέλοντες διδοῖεν· *civitatem amicam cogendam non esse, ut quicquam daret invita.*

4 Ex quibus dictis optime interpreteris illud magni pro- Luc. iii. 14.
phetæ, imo propheta majoris monitum: *μηδένα διασείσητε, μηδὲ συκοφαντήσητε, καὶ ἀρκεῖσθε τοῖς ὀψωνίοις ὑμῶν· a concussione, [g]a calumnia in quosvis abstinete, [h]contenti*

segetes sollicite cavebat ne ab equite corrumperentur: tum vero poma in arboribus pendentia tangere nemini omnino permittebatur. (Cap. 1.) Similem Alemannorum laudem in expeditione ad sanctum sepulcrum vide apud Nicetam Manuele Comneno. (Lib. I. c. 4.) Gregoras autem libro IX. idem in Venetis prædicat: *ἦσάν γε μὲν οὐδένες, οὓς οὐ μάλα ἐξέπληξεν ἡ τῶν Βενετικῶν εὐταξία, καὶ ἡ μετὰ δικαιοσύνης μεγαλοπρέπεια. οὐδὲ γὰρ ἠξίωσε τῶν πάντων ἐκείνων οὐδεὶς ἐξελθὼν ἀφελέσθαι τι τῶν ἀπάντων ἄνευ τιμῆς ἀργυρίου· nemo erat quem non admiratione percelleret Venetorum disciplina, et conjuncta cum justitia animi magnitudo. Nemo enim de exercitu egressus quicquam rerum sumere volebat nisi pecunia depensa.* (Pag. 188. *Ed. Genev.* 1616.)

[e] *Provisus rerum necessariarum*] Plinius *Historiæ Naturalis* XXVI. 4. *curve Romani duces primam semper in bellis commerciorum curam habuere?* Cassiodorus IV. 13. *Habeat quod emat, ne cogatur cogitare quod auferat.* Similia habet V. 10. et 13.

[f] *Apud Ammianum*] Quem vide et libro XXI. (cap. 5. in Oratione Juliani Imp. ad Milites, pag. 293, 294. *Ed. Vales. Gron.*)

[g] *A calumnia*] Possis vertere *a rapina*, quo sensu ea vox sumitur in græca versione Jobi XXXV. 9. Psalm. CXIX. 122. Prov. XIV. 31; XXII. 16; XXVIII. 3. Ecclesiastæ IV. 1. item Levitici XIX. 11. Eandem græcam vocem per *defraudare* vertit vulgatus interpres Lucæ XIX. 8.

[h] *Contenti estote stipendiis vestris*] Ambrosius ad hunc Lucæ locum: *id-*

or pluck a bunch of grapes; or cut the corn, or demand oil, salt or wood. So the same writer in Cassiodorus: *Let the soldier live with the provincials according to the civil law, and shew no military insolence. The shield is for the protection of the countrymen.* So Xenophon, in the *Anabasis.*

4 And hence we see the meaning of that which was said to soldiers by a prophet, and one that was greater than a prophet (Luke iii. 14): *Do violence to no man, neither accuse any falsely, and be content with*

estote stipendiis vestris. Cui simile illud Aureliani apud Vopiscum dicto loco: *annona sua contentus sit, de præda hostis non de lachrymis provincialium vivat.* Nec est quod quis putet dici hæc pulchre, sed præstari non posse: neque enim aut moneret hæc vir divinus, aut sapientes legum auctores præciperent, si crederent impleri non posse. Denique [i]necesse est concedamus fieri posse, quod factum videmus. Ideo attulimus exempla, quibus accedat illud insigne, quod [k]ex Scauro memorat Frontinus, pomiferam arborem quam in pede castrorum fuerat complexa metatio, postero die abeunte exercitu intactis fructibus relictam.

Lib. iv. 3. n. 13.

Lib. xxviii. 24.

5 Livius, cum narrasset milites Romanos in castris ad Sucronem procacius egisse, et quosdam eorum noctu prædatum in agrum circa pacatum iisse, adjicit, omnia libidine ac licentia militum, nihil instituto ac disciplina militari gestum. Est et alter insignis ejus scriptoris locus, ubi iter Philippi per Denthelatarum agros narratur: *socii erant, sed propter inopiam haud secus quam hostium fines Macedones populati sunt:*

ib. xl. 22.

circo stipendia constituta militiæ: ne dum sumtus quæritur, prædo grassetur. (Pag. 1647. *Ed. Paris.* 1569.) Quæ transscripsit Augustinus sermone xix. de verbis Domini secundum Matthæum. [Qui non est Augustini, et inter Appendices, Tom. v. Serm. 82. reperitur in *Ed. Benedictin.*] Sunt egregiæ ad hanc rem constitutiones apud Gregorium Turonensem libro II. cap. 37. in capitulis Caroli et successorum, Lib. v. tit. clxxxix. in concilio Galliæ tomo II. in capitulari II. Ludovici Pii capite xiv. et tomo III. in concilio ad S. Macram.

your wages. And so Aurelian said, *Let them live on the spoil of the enemy, not on the tears of the provincials.* And we are not to think that this is fair talking, but what cannot be done in fact: for the inspired man would not exhort to such a course, and wise expositors of law enjoin it, if they thought it could not be done. And in short, we must allow that *that* can be done, which we see is done. And on this account, we have adduced examples; to which we may add that eminent case which Frontinus mentions, of Scaurus; that an apple-tree which was included within the lines of the camp, was found next day, when the camp was broken up, with its fruit untouched.

5 When Livy speaks of the Romans, in the camp at the Sucro, behaving irregularly [in the absence of S. Scipio], and some of them going on plundering expeditions into the neighbouring neutral ground, he adds, that everything was given up to a licentious and greedy soldiery, nothing done according to military rule and discipline. And again, in the same writer, where the passage of Philip through the land of the Denthelatæ is described, it is said that *The army, being*

rapiendo enim passim, villas primum, deinde quosdam etiam vicos evastarunt, non sine magno pudore regis, cum sociorum voces nequicquam Deos sociales nomenque suum implorantes audiret. Apud Tacitum Peligni turpis fama, *Ann.* xii. 49. dum socios magis quam hostes prædatur. Idem Vitellianos *Hist.* iii. 2. notat per omnia Italiæ municipia desides et tantum hospitibus metuendos. *In Verrina* quoque Ciceronis de prætura urbana *In Verr.* i. 21. hæc est accusatio: *oppida pacata sociorum, atque amicorum, diripienda ac vexanda curasti.*

6 Atque hic omittere non possum theologorum sententiam, *Ægid. Reg. de act. sup.* quam verissimam puto, regem qui quæ debet stipendia militi- *disp.* 31. *dub.* 7. n. 95. bus non solvit, non tantum militibus teneri de damnis inde secutis, sed et subditis suis et vicinis quos inedia coacti milites male habuerunt.

III. 1 Vicissim eorum qui a bello abstinent officium est nihil facere, quo validior fiat is qui improbam fovet causam, aut quo justum bellum gerentis motus impediantur, secundum ea quæ dicta a nobis supra sunt: in re vero dubia [l]æquos se Lib. iii. 1.

Adde *legem Baioariorum* tit. ii. 5. Friderici I. legem sic refert Guntherus:

Si quis pacificæ plebis villasve domusve
Usserit, abrasis signabitur ora capillis,
Et pulsus castris post verbera multa recedet.
(Ligurin. vers. 299, *et seqq.*)

[i] *Necesse est concedamus fieri posse, quod factum videmus*] Sic et Guicciardinus disserit libro xvi.

[k] *Ex Scauro memorat Frontinus*] De Nigri severitate ob raptum gallum gallinaceum vide Spartianum. (cap. 10.)

[l] *Æquos se præbere utrisque in permittendo transitu, in commeatu præbendo*] Exemplum nobile vide apud Parutam libro viii.

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in great want, treated the country as if it had been an enemy's, plundering towns and villages; much to the king's mortification, who heard his allies imploring him and the gods for help in vain. In Tacitus, the fame of Pelignus is tarnished by his preying upon friends rather than foes. The same writer speaks of the Vitellians, as, in all the towns of Italy, idle, and formidable to their friends only. So in Cicero against Verres, *You authorized the insulting and plundering of friendly towns.*

6 And here I cannot omit the opinion of theologians, which I think perfectly true; that a king who does not pay his soldiers their wages, is not only bound to satisfy the soldiers for the damage so done them, but also to make compensation to his subjects and neighbours, whom the soldiers, under the impulse of want, have treated ill.

III. 1 On the other hand, it is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war, as we have said above; and in a doubtful case, to act alike to both sides, in per-

præbere utrisque in permittendo transitu, in commeatu præbendo legionibus, in obsessis non sublevandis. Corcyrenses
Lib. i. 35. apud Thucydidem Atheniensium officii esse aiunt, si extra partes esse velint, aut Corinthios prohibere ne ex agro Attico militem conducant, aut idem sibi permittere. Philippo Macedonum regi objectum a Romanis dupliciter ab eo fedus violatum, et quod sociis populi Romani injurias fecerit, et quod hostes auxiliis et pecunia juverit. Eadem urget T. Quintius
Liv. xxxiv. 32. in colloquio cum Nabide, *vos tamen, inquis, vestramque amicitiam ac societatem proprie non violavi. Quoties vis te arguam id fecisse? sed nolo pluribus? summam rem complectar: quibus igitur rebus amicitia violatur? nempe his maxime duabus, si socios meos pro hostibus habeas, si hostibus te conjungas.*

Lib. iv. 1. 2 Apud Agathiam legimus hostem esse, qui faciat quod
Gotth. i. 3. hosti placet; et in Procopio, [m]in exercitu hostium eum censeri qui quæ proprie ad bellum usui sunt hostili exercitui
Phil. iii. p. 46 B. subministrat. Demosthenes olim dixerat: ὁ γὰρ οἷς ἂν ἐγὼ ληφθείην ταῦτα πράττων καὶ κατασκευαζόμενος, οὗτος ἐμοὶ

[m] *In exercitu hostium eum censeri*] Et contra, socium et amicum recte ait dici non eum modo qui juxta stat in procinctu, sed et qui omnia quibus opus habet bellum aperte suppeditat: in epistola Amalasunthæ ad Justinianum. (*Gotth.* Lib. I. c. 3.)

mitting transit, in supplying provisions, in not helping persons besieged. The Corcyreans say, that it is the duty of the Athenians, if they will be neutral, either to prevent the Corinthians from raising soldiers in Attica, or to allow them to do so. To Philip king of the Macedonians it was objected, that the league was doubly violated by him: inasmuch as he had done injury to the allies of the Romans, and helped their enemies. The same is urged by T. Quinctius, in his conference with Nabis.

2 In Agathias, we read, that he is an enemy, who does what the enemy wishes: and in Procopius, that he is reckoned to be in the army of the enemy, who helps the enemy's army in matters which are properly of military use. So Demosthenes had said before. M. Acilius, in speaking to the Epirotes, who were accused of sending money to Antiochus, says that he does not know whether he is to regard them as enemies or neutrals. L. Emilius, Pretor, condemns the Teians, because they had supplied the enemy's fleet with provisions, and had promised it wine; adding, that except they did the same to the Roman fleet, he should hold them as enemies. So Augustus said that *A city lost the rights of peace when it received an enemy.*

πολεμεῖ, κἂν μήπω βάλλῃ μηδὲ τοξεύῃ· qui ea facit et machinatur quibus ego capi possim, etiamsi nec feriat, nec jaculum emittat, hostis mihi est. M. Acilius Epirotis, qui Liv. xxxvi. 35. milite Antiochum non juverant, sed pecuniam ei misisse insimulabantur, negavit scire se hostium an pacatorum numero eos habere deberet. L. Æmilius Prætor Teios arguit, quod Idem, xxxvii. 28. commeatu classem hostium juvissent, vinum promisissent: addens, ni eadem Romanæ classi darent, se pro hostibus eos habiturum. Memoratur et Cæsaris Augusti dictum: *ἔκσπονδον πόλιν εἶναι, πολέμιον ἔχουσαν παρ' αὐτῇ· pacis jus amittere civitatem, quæ hostem recipiat.* Plut. *Brut. in fin.* p. 1011 B.

3 Proderit etiam cum utraque parte bellum gerente fedus miscere, ita ut cum utriusque bona voluntate a bello abstinere, et communia humanitatis officia utrisque exhibere liceat. Apud Livium est: *pacem utrique parti, quod medios decet amicos, optent: bello se non interponant.* Lib. xxxv. 43. Archidamus Spartæ rex Eleis, cum viderentur in Arcadum partes inclinare, epistolam Plut. *Apoph.* p. 219 A. scripsit hoc tantum continentem: *καλὸν ἡσυχία· bonum est quiescere.*

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3 It may be of use for a neutral party to make a convention with each of the belligerents; so that it may be allowed with the good will of both, to abstain from war, and to exercise towards both the common duties of humanity. So in Livy. So Archidamus king of Sparta, when he saw that the Eleans inclined to the Arcadians, wrote to them, *It is well to be quiet.*

CAPUT XVIII.

DE HIS, QUÆ IN BELLO PUBLICO PRIVATIM FIUNT.

I. *An privatim hosti nocere liceat expositum cum distinctione juris naturalis, gentium, et civilis.*

II. *His, qui suo sumtu militant, aut naves instruunt, quid per internam justitiam liceat respectu hostium.*

III. *Quid respectu suæ civitatis.*

IV. *Quid Christianæ dilectionis regula ab ipsis exigat.*

V. *Quomodo bellum privatum cum publico misceatur.*

VI. *Ad quod teneatur qui sine mandato hostibus nocuit, cum distinctione explicatur.*

I. 1 QUÆ diximus hactenus pleraque ad eos pertinent, qui aut summum in bello arbitrium habent, aut publica imperia exequuntur. Videndum etiam quid privatim in bello liceat, qua naturæ, qua divino, qua gentium jure. Narrat officiorum primo Cicero Pompilii imperatoris exercitu militasse Catonis Censorii filium, sed mox dimissam legionem in qua is militabat: cum nihilominus adolescens amore pugnandi in exercitu remansisset, Catonem scripsisse ad Pompilium, ut si eum vellet remanere in exercitu, secundo eum sacramento militiæ obligaret, addita causa, quia priore amisso, jure cum hostibus pugnare non poterat. Addit et ipsa Catonis ad filium verba ex epistola, quibus eum monet ut caveat ne prælium

Cap. 2.

CHAPTER XVIII. *Of acts done by Private Persons in a Public War.*

I. 1 What we have hitherto said, pertains, for the most part, to those who either have the supreme authority in war, or hold public offices. We must now consider what is lawful for private persons, according respectively to Natural Law, Divine Law, and the Law of Nations.

Cicero relates that Cato's son served in the army of Pompilius till his legion was dismissed: that he then remained with the army as a volunteer: and that Cato wrote to Pompilius, that if he wanted to keep him in the army, he must make him take the military oath again; because the former oath being cancelled, he could not lawfully fight with the enemy. He adds also the very words of Cato's letter to his son, warning him not to take part in the fighting. So we read that Chrysas, a soldier of Cyrus, was praised, because, when he had raised his sword to cut down an enemy, he lowered it on hearing the signal for a retreat. So Seneca.

ineat: neque enim jus esse, qui miles non sit, pugnare cum hoste. [a]Sic et Chrysantam Cyri militem laudatum legimus, qui hosti imminens repressit ensem, simul ac receptui canere audierat; et Seneca: *inutilis miles dicitur, qui signum receptui datum negligit.* Plut. *Quæst. Rom.* 39. et Marcel. p. 317. De *Ira*, i. 9.

2 Sed falluntur, qui venire hoc putant ex jure gentium externo: nam id si spectes, sicut rem hostilem cuilibet occupare licet, ut supra ostendimus, ita et hostem occidere: nam illo jure hostes pro nullis habentur. Venit ergo quod Cato monebat ex disciplina militari Romana, cujus ea lex erat, Modestino notante, ut qui mandata non servasset, capite puniretur, etiamsi res bene cessisset: mandata autem non servasse intelligebatur etiam qui extra ordinem sine ducis imperio in hostem pugnasset, ut Manliana imperia nos docent: nimirum quia si id temere liceat, aut stationes desererentur, aut etiam progrediente licentia exercitus parsve ejus [b]inconsultis præliis implicaretur, quod omnino cavendum erat. Itaque Sallustius, ubi Romanam disciplinam describit, *in bello*, inquit, *sæpius vindicatum in eos, qui contra imperium in hostem pugnaverant, quique tardius revocati prælio excesserant.* Laco quidam cum hosti imminens audito receptus signo ictum repres- Lib. iii. 6. *L.* 3. *D. de re milit.* § 15. Liv. viii. 7. *Catil.* c. 9. Apud Plut. *Lacon. Apop.* p. 236 E.

[a] *Sic et Chrysantam*] Vide Xenophontem *Cyri Institutione.* (Lib. IV. c. 1. § 2. *Ed. Oxon.*)

[b] *Inconsultis præliis implicaretur*] Ita Avidius Cassius causam sententiæ suæ reddebat: *evenire potuisse ut essent insidiæ.* Narrat Vulcatius. (c. 4.)

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2 But they are mistaken, who think that this rule comes from the external Law of Nations: for if you look at that, as any one has a right to seize an enemy's property, as we have shewn above, so has he a right to kill the enemy: for in the eye of that law, enemies are held for nobodies. And therefore Cato's doctrine comes from the military discipline of the Romans: of which the rule was, as Modestinus has noted, that he who did not obey orders, should be capitally punished, even if the act turned out well. And he was understood not to have obeyed orders, who had, out of the regular ranks, without the command of the general, fought with the enemy; as the orders issued by Manlius prove to us: on this account namely; that if such conduct were permitted, either posts would be deserted, or even, as the license went further, the army, or a part of it, would be implicated in casual combats, which was by all means to be avoided. So Sallust, speaking of the Roman discipline, says, *In war those are often punished who, contrary to orders, have fought the enemy, or who, being ordered to retreat, have been slow in doing so.* The Lacedæmonian who, when

sisset, causam reddidit: ὅτι βέλτιόν ἐστι τοῦ φονεύειν, τὸ πείθεσθαι τῷ ἄρχοντι· *quia præfectis parere satius est quam hostem occidere.* Et Plutarchus cur qui militia solutus

Quæst. Rom. 39. p. 273 E. est occidere hostem non possit causam reddit, quod legibus militaribus non teneatur quibus teneri debeant pugnaturi. Et

Lib. ii. 6. apud Arrianum Epictetus memoratum modo Chrysantæ factum referens: οὕτω προυργιαίτερον ἔδοξεν αὐτῷ τὸ τοῦ στρατηγοῦ πρόσταγμα, ἢ τὸ ἴδιον ποιεῖν· *tanto illi potius videbatur ducis quam suam voluntatem exequi.*

3 At jus naturæ et internum si respicimus, videtur in bello justo cuilibet concessum ea facere, quæ parti innocenti intra justum bellandi modum profutura confidit: non etiam res captas suas facere, quia nihil ipsi debetur: nisi forte pœnam justam exigat communi hominum jure. Quod postremum

Lib. ii. 20. § 10. quomodo per evangelii legem restrictum sit, ex his quæ supra a nobis tractata sunt, intelligi potest.

4 Mandatum autem esse potest aut generale, aut speciale.

Serv. ad Æn. viii. 1. Generale, ut in tumultu apud Romanos Consul dicebat: *qui rempublicam salvam volunt me sequantur.* Imo et singulis

about to cut down an enemy, lowered his sword, on hearing the signal for retreat, gave the reason, *It is better to obey a commanding officer than to kill an enemy.* And Plutarch gives, as a reason why he who has left the army cannot lawfully kill an enemy, that he is not bound by that military law by which persons who engage in battle should be bound. And Epictetus, in Arrian, referring to the act of Chrysas just mentioned, says, *So much better did he think it to do his officer's will than his own.*

3 But if we look to Natural Law and internal right or justice, it seems to be conceded, in a just war, to any one, to do any thing, which he considers will benefit the innocent party, within the just limits of warfare: but not to make captured property his own, because there is nothing owing him, except in the case in which he is exacting a just punishment by the common right of war. Which last, in what manner it is restricted by the Gospel Law, may be understood by what has been already said.

4 A mandate of a commanding officer may be either general or special: general, as in a tumult among the Romans, the Consul said, *Who are for the safety of the republic follow me.* And sometimes, even individual subjects have the right given of killing an enemy, even when not in self-defense, when it is expedient on public grounds.

II. 1 A special command may be given, not only to those who receive pay, but also to volunteers, who serve at their own charge, and

interdum subditorum jus datur occidendi etiam extra sui tutelam, ubi id publice expedit. *C. quando liceat unicuique l.* 1. et 2.

II. 1 Speciale mandatum habere possunt non hi tantum qui stipendia percipiunt, sed et qui suo sumtu militant, et qui, quod plus est, suo sumtu partem belli administrant, ut qui naves instruunt ac sustentant suis impendiis, quibus vice mercedis concedi solet ut capta sua faciant, sicut alibi diximus. Id Lib. iii. 6. vero quatenus procedat, illæsa justitia interna, et caritate, non immerito quæritur.

2 Justitia aut hostem respicit, aut ipsam civitatem cum qua contrahitur. Hosti diximus eripi posse possessionem rerum omnium, quæ bellum alere possunt, securitatis causa, sed hoc sub onere reddendi: ipsum vero dominium ad compensationem usque ejus quod aut ab initio belli, aut ex post facto civitati justum bellum gerenti debetur, sive res sint civitatis hostilis, sive singulorum, etiam per se innocentium: bona vero nocentium etiam ex pœnæ causa adimi et acquiri capientibus posse. Fient ergo res hostiles eorum, qui belli partem suo sumtu administrant, quod hostes attinet, hactenus ut is quem expressi modus non excedatur, quod æquo arbitratu æstimandum est.

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who, what is more, support part of the charge of the war; as for instance, those who fit out ships, and support them at their own expense; and who are allowed, instead of pay, to appropriate their own captures, as we have elsewhere said. But how far this may be done without violating internal justice and charity, is a question not unworthy of discussion.

2 The justice of the case has respect, either to the enemy, or to the state with which such contract is made. We have already said that from an enemy, any possession which may feed the war, may be taken away for the sake of security; but this, under the *onus* of restoring it: and that the ownership may be taken, so far as compensation for what was either owing at the beginning of the war, or has become owing by some subsequent pact, to a state carrying on a just war; whether such possession belong to the hostile state, or to individuals, even innocent ones: and that the goods of guilty parties may, in the way of penalty, be taken from them and acquired by the captors. And thus, so far as the rights of the enemy are concerned, hostile property will become the property of those who carry on a part of the war at their own expense [Privateers], so far as the limit which has been stated is not exceeded; which must be estimated by an equitable opinion.

III. Adversus suam autem civitatem justum justitia interna id ipsum erit, si contractui æqualitas insit, hoc est, si sumtus et pericula tanti sunt quanti prædæ alea: nam si hæc spes multo pluris valeat, reddendum erit civitati quod supererit, perinde ac si quis nimium vili pretio jactum, incertum quidem, sed tamen facilem et magnæ spei emisset.

IV. Ceterum, etiam cum justitia stricte dicta non læditur, est ut peccetur adversus id officium quod in aliis diligendis consistit, præsertim quale Christiana lex præscribit, ut si appareat talem prædationem præcipue nocituram non hostium universitati, aut regi, aut his qui per se sontes sunt, sed innocentibus, et quidem adeo ut eos detrusura sit in summas calamitates, in quas etiam eos qui privatim nobis debent con-
Sylv. *in verb. bell.* n. 8. v. 5. jicere, immisericordiæ foret. Quod si ad hæc accedat ut ea deprædatio neque ad finem bello imponendum, neque ad hostium publicas vires accidendas notabile aliquod momentum habeat, tum vero probo homine, præsertim Christiano, indignus censeri debet [c] quæstus ex sola temporum infelicitate.

V. Evenit autem interdum ut occasione belli publici nascatur bellum privatum, puta si quis in hostes inciderit, et

c *Quæstus hæc sola temporum infelicitate*] Nam et Crassum hoc nomine culpat Plutarchus: *τὰ πλεῖστα τούτων ἐκ πυρὸς συνήγαγε καὶ πολέμου, ταῖς*

III. The internal justice of the case, with regard to the state for which the privateer acts, is satisfied if the contract be an equal one: that is, if the expense and danger be equal in value to the chance of prizes. For if this chance is much more valuable, the surplus ought to be given to the state; as if any one had beforehand purchased a haul of fish at an unusually low price.

IV. But even if justice strictly speaking be not violated, there may be an offense against the loving our neighbour, especially in a Christian view: as if it appear that such privateering will not hurt the general body of the enemy, or their king, or the guilty portion of them, but the innocent; and will inflict upon them calamities which it would be cruel to inflict, even on those who are personally indebted to us. And if, besides this, such a privateering warfare is not likely to conduce, either to the termination of the war, or to any notable damage of the enemy's public power, then it must be considered unworthy a right-minded man, and especially a Christian, to make a gain in this way out of the unhappiness of the times.

V. It sometimes happens, that a private war grows out of a public one; as, for instance, if any one fall in with the enemy, and incur danger of life or goods; in which case the rules are to be observed which we have elsewhere stated, as to the lawfulness of defending

vitæ aut rerum adeat periculum, quo eventu ea erunt observanda quæ de concesso tuendi se modo alibi diximus. Solet Lib. ii. 1. et conjungi auctoritas publica cum privata utilitate: ut si quis magno ab hostibus damno affectus impetret jus ex rebus hostium damna sarciendi: quod jus definiendum est ex iis quæ de pignorationibus supra a nobis sunt tradita. Lib. iii. 2.

VI. At si quis miles aut alius, etiam in bello justo, ædificia hostium incenderit, agros vastaverit, atque id genus dederit damna, non jussus, adde cum neque necessitas subesset, neque justa causa, teneri eum ad sarcienda damna recte a theologis est proditum. Merito autem addidi, quod ab illis omissum est, si justa causa non subsit: nam ea si adsit, tenebitur forte suæ civitati, cujus leges transgressus est; non item hosti cui nullam fecit injuriam. Non dissimile est quod Carthaginiensis quidam Romanis Annibalem dedi postulantibus respondebat: *non privato publicove consilio Saguntum oppugnatum sit, quærendum censeo: sed utrum jure an injuria? nostra enim hæc quæstio atque animadversio in civem nostrum est, nostro an suo fecerit arbitrio: vobiscum una disceptatio est, licueritne per fedus fieri.* Sylv. *in verb. bell.* p. 1.

κοιναῖς ἀτυχίαις προσόδῳ τῇ μεγίστῃ χρησάμενος· pleraque horum ex igne belloque rapuit, nihil magis lucro habens quam communes calamitates. (*Vit. Crass.* init. pag. 543 b.)

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one's self. Also public authority is often conjoined with private utility; as if any one, having suffered some great loss from the enemy, should obtain authorization to reimburse himself out of the enemy's property: and the right, in this case, is to be defined by what we have said above of *pignoration.*

VI. But if any one, soldier or other, even in a just war, sets fire to buildings of the enemy, wastes the land, and inflicts damage of that kind, without orders, and we must add, when there is neither any existing necessity nor any just cause, he is bound to make good the damage, as is rightly laid down by theologians. But I have, for good reason, added a condition omitted by them, *If there be not any just cause;* for if there be such a cause, he may perhaps be responsible to his own state whose laws he has violated, but not to the enemy to whom he has done no wrong. On this, hear what a Carthaginian replied to the Romans, when they asked to have Annibal given up to them: *Whether Saguntum was taken by public or by private act, is not the point, but whether it was taken rightfully or wrongfully. The question between us and our citizen is, whether he acted by his own motion or by our direction: the question between you and us is, whether what was done was lawful under our convention with you.*

CAPUT XIX.

DE FIDE INTER HOSTES.

I. *Fidem deberi hostibus quibusvis.*
II. *Refellitur sententia, quæ prædonibus et tyrannis fidem servandam negat.*
III. *Solvitur argumentum sumtum ex eo quod tales pœnam merentur, et ostenditur hoc non considerari ubi tanquam cum tali actum est.*
IV. *Non obstare quod promissio metu extorta sit, si ei qui promisit metus illatus non sit:*
V. *Aut si juramentum accesserit, quamquam id adversus prædonem impune, quod homines attinet, violatur.*
VI. *Eadem aptata ad subditos bellantes.*
VII. *Specialis difficultas circa promissa subditis facta, ob supereminens dominium, tractatur:*
VIII. *Et ostenditur talia promissa firmari civitatis jurejurando:*
IX. *Aut si tertius se interponat cui fiat promissio.*
X. *Mutatio status publici quomodo fiat.*
XI. *Metus exceptionem ad bellum solenne juris gentium non pertinere:*
XII. *Quod intelligendum de metu tali quem jus gentium agnoscat.*
XIII. *Servandam fidem et perfidis:*
XIV. *Non si conditio deficiat: quod locum habere si alter parti pactorum non stet.*
XV. *Nec si justa compensatio opponatur:*
XVI. *Quamvis ex alio contractu:*
XVII. *Aut damno dato.*
XVIII. *Imo et ex pœna:*
XIX. *Quomodo hæc in bello locum habeant.*

I. 1 QUID quantumque in bello liceat, diximus partim nude spectari, partim ex promisso antecedente. Parte priore absoluta, restat posterior, quæ est de fide hostium inter se. Egregium est consulis Romani Silii Italici dictum:

Lib. xiv. v. 169, et seqq.

CHAPTER XIX. *Of Faith between Enemies.*

I. 1 What is lawful in war, and to what extent, we have said, is to be considered, partly absolutely, partly with reference to antecedent promise. Having finished the former part of the subject, there remains the latter, namely the question of the faith of enemies to one another. The rule of keeping such faith inviolate, is praised by Silius Italicus, Xenophon, Aristides, Cicero.

2 Public faith, as the elder Quintilian says, makes truces between

Optimus ille
Militiæ, cui postremum primumque tueri
[a]Inter bella fidem.

Xenophon *Oratione de Agesilao*, οὕτω μέγα καὶ καλὸν κτῆμα τοῖς τε ἄλλοις ἅπασι καὶ ἀνδρὶ δὴ στρατηγῷ, τὸ ὅσιόν τε καὶ πιστὸν εἶναί τε καὶ ὄντα ἐγνῶσθαι· *tanta tamque præclara res est in omnibus quidem, sed præcipue in ducibus, religionis et fidei observantes esse atque haberi.* Aristides Leuctrica quarta: ἐν εἰρήνῃ καὶ σπονδαῖς μάλιστα οἱ τὰ δίκαια ποιεῖν βουλόμενοι κρίνονται· *in pace aliisque publicis conventionibus servandis maxime spectantur qui justitiæ student:* ut enim recte dixit Cicero *de Finibus* quinto: *nemo est qui non hanc affectionem animi probet atque laudet, qua non modo utilitas nulla quæritur, sed contra utilitatem etiam conservatur fides.* Cap. 3. § 5. Tom. II. p. 184 c. Cap. 22.

2 Publica fides, ut apud patrem est Quintilianum, inter armatos hostes inducias facit, deditarum civitatum jura conservat. Apud eundem alibi: *fides supremum rerum humanarum vinculum est: sacra laus fidei inter hostes.* Sic et Ambrosius: *liquet igitur etiam in bello fidem et justitiam servari oportere.* Et [b]Augustinus: *fides quando promittitur, etiam hosti servanda est contra quem bellum geritur:* nimirum hostes qui sunt, homines esse non desinunt. At homines omnes, qui ad rationis usum pervenerunt, capaces sunt juris ex promisso. Camillus apud Livium ait, *sibi cum Faliscis eam esse societatem, quam ingeneravit natura.* Decl. 267. Decl. 343. Lib. ii. 29. Offic. Epist. 205. ad Bonif. Lib. v. 27.

3 Ex hac autem societate rationis et sermonis nascitur ea

[a] *Inter bella fidem*] Archelaus philosophus apud Appianum *Civilium* IV. σπονδὰς ἐπὶ τοῖς ὅρκοις ἐσπένδετε, καὶ δεξιὰς ἐτίθεσθε, αἳ καὶ παρὰ τοῖς πολεμίοις ἰσχύουσι· *federa jurastis, dedistis dexteras, quæ etiam inter hostes valent.* (Pag. 628. *Ed. H. Steph.*) Laudat hujus virtutis nomine Africanum minorem Diodorus Siculus in *Excerptis Peirescianis.* (Pag. 342.)

[b] *Augustinus*] Qui idem argumentum late tractat epistola CCXXV. (126. secundum novam divisionem.)

armed enemies, and preserves the rights of surrendered cities. It is the supreme tie, as he elsewhere says. So Ambrose; Augustine. In fact, those who are enemies do not cease to be men: but all men (who have the use of reason) are capable of having rights given them by promise. So Camillus in Livy.

3 Out of the common use of reason and language, arises the obligation from promise, of which we speak. Nor are we to think

de qua agimus obligatio ex promisso. Neque vero putandum est, quia hosti falsum eloqui aut licere, aut crimine vacare ex multorum sententia supra diximus, pari ratione hoc et ad fidem datam referri posse. Nam vero eloquendi obligatio est ex causa, quæ bello fuit anterior, et bello tolli forte aliquatenus potest: at promissio per se jus novum confert. Vidit hoc

Nic. iv. 13. discrimen Aristoteles quum de veriloquio agens ait: *οὐ περὶ τοῦ ἐν ταῖς ὁμολογίαις ἀληθεύοντος λέγομεν, οὐδ' ὅσα εἰς ἀδικίαν καὶ δικαιοσύνην συντείνει, ἄλλης γὰρ ἂν εἴη ταῦτ' ἀρετῆς· non de eo loquimur, qui in conventionibus verax est, et in iis quæ ad justitiam et injustitiam pertinent: sunt enim hæc alterius virtutis.*

Cap. 7. p. 612. 4 Pausanias Arcadicis de Philippo Macedone: *στρατηγὸν ἀγαθὸν οὐκ ἄν τις φρονῶν ὀρθὰ καλέσειεν αὐτόν· ὅς γε καὶ ὅρκους θεῶν κατεπάτησεν ἀεὶ, καὶ σπονδὰς ἐπὶ παντὶ ἐψεύσατο, πίστιν τε ἠτίμασε μάλιστα ἀνθρώπων· bonum eum Imperatorem nemo recte vocaverit, ut qui pro more habuerit jusjurandum contemnere, fidem quavis occasione violare, ita ut nulli homini fides vilior fuerit.* Valerius

Lib. ix. 6. n. 2. *ext.* Maximus de Annibale: *bellum adversus populum Romanum et Italiam professus, adversus ipsam fidem acrius gessit, mendaciis et fallacia quasi præclaris artibus gaudens: quo*

[1] Est apud Homerum:

κέρδιον ἡμῖν
Ἔλπομαι ἐκτελέεσθαι, ἵνα μὴ ῥέξομεν ὧδε.

i. e. ut bene vertunt ultimi Intt. *Quare nihil utile nobis autumo effectum iri, nisi fecerimus ita*, scilicet, nisi reddamus Helenam. Sic Auctor noster, ex memoriæ vitio, sensum et seriem orationis immutavit: quemadmodum etiam in ora libri scriptum erat, *Iliad.* X. pro *Iliad.* H. *J. B.*

[c] *Adulterium non committi*] Seneca *in Excerptis* IV. 7. *Non putavi adulterium, uxorem tyranni polluere: sicut*

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that, because to tell a falsehood to an enemy may either be lawful, or at least, allowable, according to the opinion of many (as stated above), that by parity of reason this may also be true of faith given. For the obligation of speaking the truth arises from a cause which was anterior to the war, and may perhaps, in some degree, be taken away by the war; but a promise of itself confers a new right. Aristotle saw this difference when he said, *In speaking of Truth at present we mean Sincerity, which is opposed to Pretence; not Truth or Good Faith, which applies to contracts, for this belongs to another Virtue. Eth. Nic.* IV. 13.

4 Pausanias says of Philip of Macedon, that he could not be called a great general, for he was in the habit of breaking his promises on every occasion. So Valerius Maximus of Annibal. The Trojans in

evenit ut alioqui insignem nominis sui memoriam relicturus, in dubio majorne vir an pejor haberi deberet poneret. Apud Homerum semet accusant adacti conscientia Trojani: *Iliad.* H. vv. 351, 352.

Νῦν δ' ὅρκια πιστὰ
Ψευσάμενοι μαχόμεσθα, τῷ οὐ νύ τί κάλλιόν ἐστι[1].

Rumpentes federa sacra
Juratamque fidem pugnamus, non quibus est fas.

II. 1 Et supra jam diximus non recipienda illa Ciceronis: Lib. ii. 13. § 15. *nulla nobis societas cum tyrannis, sed potius summa dis-* *De Offic.* iii. 29. *tractio est.* Item: *pirata non est ex perduellium numero definitus: cum hoc nec fides esse debet, nec jusjurandum commune.* De tyranno etiam Seneca: *quicquid erat quo* Lib. vii. *de benef.* c. 19. *mihi cohæreret intercisa juris humani societas abscidit.* Ex quo fonte error Michaëlis Ephesii profluxit, qui ad quintum *Nicomacheorum* dixit, in tyranni uxorem [c]adulterium non Cap. 10. committi: quod ipsum pari errore quidam [d]Judæorum magistri de alienigenis dixerunt, quorum conjugia pro nullis habent.

2 Atqui belli piratici magnam partem Cn. [e]Pompeius pactionibus confecit, vitam illis pollicitus et sedes, in quibus sine rapto viverent. Et tyranni interdum libertatem reddiderunt, impunitatem pacti. Cæsar *Belli Civilis* tertio, a Romanis duci- Cap. 19. bus cum prædonibus et fugitivis, qui in Pyrenæis erant mon-

nec homicidium, tyrannum occidere. Julius Clarus in § *homicidium* num. 36. feminam bannitam impune adulterio corrumpi censuit.

[d] *Judæorum magistri*] Rabbi Levi Ben Gerson et Rabbi Salomo ad Levit. xx. 10.

[e] *Pompeius pactionibus confecit*] Sic improbata Didii perfidia in Celtiberos ex rapto viventes. [Vide APPIAN. *De Bell. Hispan.* pag. 312, et, quod spectat Pompeium, PLUTARCH. in ejus *Vita*, pag. 632, 633. *J. B.*]

Homer reproach themselves with having broken their oaths.

II. 1 We have above said, that we are not to accept that maxim of Cicero, that *with Tyrants we have no community of intercourse, but the most entire separation;* and also, *a Pirate is not a regular enemy; with him we can neither have faith nor oath in common.* So Seneca speaks of the society of human right being cut off with a tyrant. And from this source, flowed the error of Michael Ephesius, who, in his *Commentary on Aristotle,* says, that with the wife of a tyrant, adultery cannot be committed. And some of the Jewish masters, by a like error, hold this of strangers, whose marriage they reckon as nothing.

2 And yet Pompeius wound up the war of the pirates, in a great degree, by conventions, in which he promised them their lives and a settlement in which they might live without rapine. And tyrants

tibus, actum de compositione scribit; quis dixerit, si quid convenisset, nullam inde exstituram fuisse obligationem? non habent quidem isti specialem istam communionem, quam inter hostes in bello solenni et pleno introduxit jus gentium: at quia homines sunt, communionem habent juris naturalis, ut recte
Pag. 322. disserit Porphyrius, libro de non esu animalium tertio, ex quo
Lib. xxxvi. *frag.* n. 1. nascitur ut pacta servanda sint. Sic Diodorus fugitivorum duci Apollonio a Lucullo fidem servatam memorat. Et Dio
Lib. lvi. p. 686. scribit, ab Augusto [2] Crocotæ latroni persolutum pretium capiti ejus impositum, cum se ipse sisteret, ne fides violaretur.

III. 1 Videamus tamen ecquid a Cicerone non allatum proferri speciosius possit. Primum hoc est, quod qui atrociter malefici sunt, neque pars sunt ullius civitatis, hi a quovis
[[ii. 20. 8.]] homine puniri possunt si jus naturæ respicimus, ut alibi a nobis explicatum est. At qui puniri possunt ut vitam amittant, his et res et jura sua possunt auferri: sicut recte dixit idem
Offic. iii. 6. Cicero: *non est contra naturam spoliare eum, si possis, quem honestum est necare.* Inter jura autem est hoc jus ex promisso quæsitum: potest igitur et hoc in pœnam ei auferri. Respondeo, processurum hoc, si non tanquam cum malefico

[2] Ita veteres Edd. sed legendum Cocotottæ, ut est apud Auctorem, unde hoc petitur. *J. B.*

[f] *Si quando cum tali, qua talis est, actum est*] Terentius *in Adelphis:*
Leno sum, fateor: pernicies communis adolescentium:

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have sometimes restored liberty to their subjects, bargaining for impunity. Cesar writes that the Roman generals treated with the bands of robbers and fugitives who were in the Pyrenean mountains: and who will say that, if a convention had been made, no obligation would have followed from it? It is true, such persons have not that special community of rule, which the law of nations has introduced between enemies, in a regular and complete war: but, inasmuch as they are men, they are under a common tie of natural law, as Porphyry explains; whence it follows, that conventions with them are to be observed. So Lucullus kept faith with Apollodorus, the leader of the fugitives. And Augustus paid to Crocotas the robber, when he surrendered himself, the reward which had been promised on his being taken, that faith might be kept.

III. 1 But let us see whether any arguments, more specious than those which Cicero gives, can be adduced against such a rule. The first reason which suggests itself is, that atrocious criminals, who are not part of any state, may be punished by any man, if we merely regard natural law, as we have elsewhere explained: and they who may be punished by loss of life, may be deprived of property and other rights;

actum esset; at [f] si quando cum tali, qua talis est, actum est, simul de remittenda, quod hanc rem attinet, pœna actum censeri debet; quia semper, ut alibi diximus, ea sumenda est interpretatio: quæ cavet, ne actus in vanum recidat.

2 Non male apud Livium Nabis, cum tyrannidem ipsi objiceret Quintius Flaminius: *de nomine hoc respondere possum, me, qualiscumque sum, eundem esse qui fui, cum tu ipse mecum, T. Quinti, societatem pepigisti.* Et mox: *jam feceram hæc, qualiacumque sunt, cum societatem mecum pepigistis.* Addit, *si quid ego mutassem, mihi meæ inconstantiæ, cum vos mutetis, vobis vestræ ratio reddenda est.* Locus est non dissimilis in oratione Periclis, ad cives suos apud Thucydidem: τὰς πόλεις αὐτονόμους ἀφήσομεν, εἰ καὶ αὐτονόμους ἔχοντες ἐσπεισάμεθα· *civitates socias liberas esse patiemur, si tales fuerunt quo tempore factum est fedus.* Liv. xxxiv. 31. Lib i. *in fin.* c. 144.

IV. Deinde objici potest, quod alibi diximus, eum qui metu causam dedit promisso, teneri liberare promissorem, quia damnum dedit per injustitiam, id est, per actum pugnantem et cum natura libertatis humanæ, et cum natura actus Lib. ii. 11. § 7.

Perjurus, pestis: tamen tibi a me nulla est orta injuria. (II. I. 34.)

Vide hac de re scriptorem *de compositione pacis inter principes et ordines Imperii.*

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as Cicero rightly says. Now among other rights, is this Right bestowed by a Promise; therefore this right may be taken from him as a penalty. To this I answer, that the argument would hold, if the convention with him had been on the supposition of his not being a criminal. But when the treating with such a one has gone on with him as being such a one, we must suppose that the treaty included the remission of the penalty, so far as this matter is concerned: because, as we have elsewhere said, we must suppose such an interpretation, as provides against the whole act being null and void.

2 In Livy, Nabis well says, when Q. Flaminius objects to him his being a tyrant: *With regard to that name, I can answer, that whatever I am, I am the same with whom you, T. Quintius, have made a league of alliance.* And again: *I had already done those things, whatever their character be, when you made an alliance with me.* He adds, *If I had changed in anything, I should have had to give account of my inconsistency; as it is, you owe an account of yours.* There is a similar passage in Pericles's speech to his citizens in Thucydides: *We shall suffer the cities in alliance with us to be free, if they were so when the treaty was made.*

IV. Again, it may be objected that, (as we have said already,) he who, by means of fear, caused the promise, is held to free the promiser,

qui liber esse debuit. Hoc vero sicut fatemur interdum locum habere, ita non ad omnia promissa prædonibus facta pertinet: nam ut cui promissum quid est, ad liberandum promissorem teneatur, opus est, ipse metu injusto causam promisso dederit[3]. Si quis ergo ut amicum vinculis eximeret promiserit pretium, tenebitur: huic enim metus illatus non est, qui ad contrahendum sponte venit.

V. Adde quod et qui injusto metu coactus promisit, teneri poterit, accedente jurisjurandi religione: nam inde, ut alibi diximus, homo non homini tantum, sed et Deo obstringitur, adversus quem metus exceptio non est. Verum tamen est, ex tali vinculo solo promittentis heredem non teneri, quia in heredem transeunt quæ in humano sunt commercio ex primæva dominii lege, at in his non est jus illud Deo quæsitum qua tale. Iterum illud quoque ex superioribus repetendum est, si quis fidem juratam aut injuratam prædoni datam violet, cum eo nomine pœnam apud alias gentes non debiturum: quia odio prædonum placuit gentibus, quæ adversus eos etiam vitiose committuntur, dissimulare.

Lib. iii. 4. § 18.

[3] At vide quæ diximus ad Pufendorfium, *De Jur. Nat. et Gent.* Lib. III. cap. 6. § 11. Not. 11. *J. B.*

g *M. Pomponius tribunus plebis*]

because he inflicted damage by injustice; that is, by an act which is at variance with the nature of human liberty, and with the nature of an act which ought to be free. But though we allow that this may sometimes hold, it does not apply to all promises made to robbers. For, that he to whom a promise has been made, should be bound to liberate the promiser, it is necessary that he should have caused the promise by unjust fear. If, then, any one have promised a payment in order to extricate a friend from captivity, he is bound by his promise; for he has not been put in fear, but comes and makes the contract of his own free will.

V. Add to this, that even he who, under the influence of unjust fear, has made a promise, may be bound if the sanction of an oath be added. For then, as we have elsewhere said, man is not bound to man only, but to God also, towards whom fear is not an exception. It is however true, that, by such a bond of itself, the heir of the promiser is not bound; because what passes to the heir is only what belongs to human commerce, from the primeval law of ownership: and the right which belongs to God, as such, is not included among such things. And moreover we must again repeat what we have said above; that if any one violate his faith given to a robber, either with or without an oath, he is not on that account liable to punishment at the hands of

VI. Quid dicemus de subditorum bellis adversus reges aliasque summas potestates? his, etiamsi causam per se non injustam habeant, jus tamen per vim agendi deesse ostendimus alibi. Potest interdum et tanta esse aut causæ injustitia, aut Lib. i. 4. resistendi improbitas, ut puniri graviter possit. Tamen si quasi cum desertoribus aut rebellibus actum sit, pœna promisso opponi non potest, secundum ea quæ modo diximus. Nam et servis fidem servandam veterum pietas existimavit, credito Lacedæmonios iram divinam expertos, quod Tænarenses servos contra pacta occidissent. Æliani. *Var. Hist.* vi. 7. Et Diodorus Siculus notat fidem servis datam in fano Palicorum nunquam a quoquam domino fuisse violatam. Lib. xi. 88. Metus autem illati exceptio et hic poterit elidi interposito jurejurando, sicut [g] M. Pomponius tribunus plebis jurejurando obstrictus servavit, quod L. Manlio metu coactus promiserat.

VII. Sed hic supra priores specialem difficultatem facit jus legis constituendæ et jus supereminens dominii in res subditorum quod civitati competit, et ejus nomine a summam po-

Juravit tribunus, nec fefellit, et causam accusationis remissæ concioni reddidit. Nulli alii licuit impune tribunum in ordinem redigere. Seneca *de Beneficiis* III. c. 37.

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other nations; inasmuch as, on account of the hatred borne to robbers, nations have agreed to overlook what is done against them, even by vicious acts.

VI. What shall we say of the wars of subjects against kings and other supreme authorities? That these, even when they have a cause in itself not unjust, still have not the right of acting by force, we have shewn elsewhere. But sometimes, in such cases, the injustice of the cause, or the wickedness of the resistance, may be so great, that it may be liable to heavy punishment. And yet if a treaty be conducted with persons, as with deserters or robbers, such liability cannot be opposed to the promise, as we have just said. Even to slaves, faith must be kept, according to the piety of the ancients; and it was believed that the Lacedæmonians were visited by the divine anger, because, contrary to convention, they had put to death the Tænarians, who were slaves. And it is noted by Diodorus, that faith pledged to a slave in the temple of the Palici was never violated by a master. And the exception of fear imposed, may here also be cancelled by interposing an oath; as M. Pomponius, tribune of the people, under the obligation of an oath, kept the promise which L. Manlius had made under fear.

VII. But beyond these difficulties a special difficulty arises from the right which the State possesses to make laws, and from its right of

testatem habente exercetur. Id enim jus si ad omnes spectat res subditorum, quidni etiam ad jus ex promisso bellico natum? quod si conceditur, videntur inanes fore omnes tales pactiones, ac proinde belli nisi per victoriam finiendi spes nulla. Sed notandum contra est, jus illud supereminens non promiscue competere, sed quatenus communiter expedit in regimine non dominico sed civili, etiam regio. Plerumque autem communiter expedit pacta talia servari, quo ea pertinent quæ de præsenti statu tuendo alibi dicta a nobis sunt. Adde quod ubi hujus dominii usum res exigit, compensatio tamen facienda est, ut infra latius explicabitur.

VIII. 1 Præterea possunt pacta sanciri jurejurando, nec tantum a rege aut senatu, sed et ab ipsa civitate, quomodo in leges suas Lacedæmonios jurare fecit Lycurgus, Athenienses Solon, et ne personarum mutatione jus jurisjurandi intercideret, repeti quotannis jusjurandum[4]. Id enim si fiat, omnino ne publicæ quidem utilitatis causa recedendum a promisso erit: nam et de suo cedere civitas potuit, et verba possunt ita esse aperta ut nullam exceptionem admittant. Valerius Maximus Athenas ita alloquitur: *lege legem, quæ te jure-*

Plut. *Lycurg.* p. 57. Idem, *Vit. Solon.* p. 92.

Lib. v. 3. n. 3. *ext.*

[4] Vide quæ diximus ad PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. IV. cap. 2. § 17. Not. 2. *J. B.*

[h] *Leges sacratas appellabant*] Vide

eminent dominion over the goods of the subjects; which rights are exercised in its name by the supreme authority. For if that right extend to all the possessions of the subjects, why should it not extend to the right arising from a promise made in war? And if this be granted, it would seem that all conventions must be of no force, and consequently, that there is no way of terminating a war but by victory. But on the other side, it is to be noted, that that eminent right does not extend to everything promiscuously, but so far as it is expedient, as a part, not of a master's authority, but of civil or royal authority. And in general, it is expedient that such conventions should be observed; to which point pertains what we have elsewhere said, of maintaining the present state of things. Add to this, that when the case requires the exercise of this eminent dominion, compensation is to be made, as will be explained more at length below.

VIII. 1 Moreover, compacts may be sanctioned by oath, not only by a king or a senate, but by the state itself; as Lycurgus made the Lacedæmonians swear to observe his laws, and Solon, the Athenians, his; and that the force of the oath might not be broken down by the change of persons, the oath to be repeated every year. For if that be done, there must be no going back from the promise, not even

jurando obstrictam tenet. Romani hoc genus [h]leges sacratas appellabant, per quas ipse populus Romanus, ut Cicero pro [[cap. 15.]] Balbo explicat, religione obligabatur.

2 Est ad hanc rem pertinens disputatio per se obscurior apud Livium libro tertio, ubi ex sententia multorum juris interpretum ait tribunos esse sacrosanctos, non etiam ædiles, judices, decemviros, quorum tamen si cui noceretur id non jure fieret. Causa discriminis est, quod ædiles atque alii lege sola defendebantur: quod autem postremum populus jussisset id ratum erat, manente tamen lege nemini contra agere jus erat: at tribunos religio publica populi Romani tuebatur: nam jusjurandum intercesserat, quod ab his ipsis qui juraverant salva religione tolli non poterat. Dionysius Halicarnassensis libro sexto: Βροῦτος ἐκκλησίαν συναγαγὼν συνεβούλευε Cap. τοῖς δημόταις ἱερὰν καὶ ἄσυλον ἀποδεῖξαι τὴν ἀρχὴν, νόμῳ τε καὶ ὅρκῳ βεβαιώσαντας αὐτῇ τὸ ἀσφαλές· ἐδόκει ταῦτα πᾶσι. *Brutus concione advocata auctor Quiritibus fuit, ut magistratum hunc non lege tantum sed et jurejurando inviolabilem redderent, quod omnibus placuit.* Hinc lex illa sacrata appellatur. Ideoque improbatum fuit bonis [i]factum Ti-

Manutium *de Legibus.*

[i] *Factum Tiberii Gracchi*] Vide id late narratum Plut. in ejus vita. (pag. 831, *et seqq.*)

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for the sake of public utility. For the state may give up what is clearly its own, and the words may be so plain as to allow no exception. Valerius Maximus says to the Athenians, *Read the Law to which you are bound by oath.* The Romans called such laws *leges sacratæ:* and by such, the Roman people itself, as Cicero for Balbus explains, was in conscience bound.

2 There is a somewhat obscure dissertation on this subject, in the third Book of Livy, in which he says that, according to the opinion of many jurists, the tribunes were *sacrosanct,* but not the ediles, judges, decemvirs; though if harm was done to any of them it was unlawful. The cause of the difference is, that the ediles and others were defended by the law only; and while the law lasted, no one might act against it; but the tribunes were defended by the public religious engagement of the Roman people: for an oath had been administered, which those who had taken it could not set aside with a safe conscience. So Dionysius relates the rule established by L. Junius Brutus. And hence this law was called *sacrata.* And therefore good men condemned the act of Tiberius Gracchus, when he abrogated the tribuneship of Octavius; and said that the tribunitian power has its sacredness from the people, not against the people. And therefore,

berii Gracchi, cum Octavio tribunatum abrogavit, dicens tribunitiam potestatem a populo habere sanctimoniam, non adversus populum. Ergo, ut diximus, jurejurando et civitas et rex obstringi poterunt, etiam in causa subditorum.

IX. Sed et tertio, qui metum non intulit, promissio valide fiet: nec scrutabimur quid aut quatenus ejus intersit, quæ juris Romani sunt subtilitates: natura enim omnium hominum interest ut hominibus aliis consulatur. Sic Philippo, Liv. xxxix. 23. [k]pace cum Romanis inita, jus sæviendi in Macedonas qui in bello ab eo defecerant ademtum legimus.

X. Sed et, quemadmodum probavimus alibi, status mixtos interdum existere, sicut de statu puro in purum, ita et in mixtum transiri pactis potest: ita ut subditi qui fuerant, incipiant summum habere imperium, aut certe partem ejus, etiam cum libertate partis ejus vi tuendæ.

XI. 1 Bellum vero solenne, id est, publicum utrinque et indictum sicut alia habet peculiaria in jure externo posita, ita et hoc, ut quæ in eo bello aut ejus finiendi causa promit-

[k] *Pace cum Romanis inita, jus sæviendi in Macedonas qui in bello ab eo defecerant ademtum legimus*] Est simile exemplum apud Parutam lib. vi.

[l] *Ita et metus qui tali bello utrinque infertur*] Vide dictum scriptorem de

as we have said, a state or a king may be bound by an oath, even in the case of subjects.

IX. But also, in such a case, a valid promise may be made to a third person, who has not imposed fear. Nor, so far as this rule is concerned, shall we inquire closely what are the subtilties of the Roman law. For by nature, it is the interest of all men, that regard should be had to other men besides the parties. Thus when Philip made peace with the Romans, he was deprived of the power of punishing the Macedonians, who had revolted from him.

X. But also, since we have proved elsewhere, that mixed states sometimes exist; as we may pass from one pure state to another, so we may pass into a mixed state by compacts; so that they who had been subjects, may begin to have the supreme authority, or at least a part of it; and even with the liberty of defending that part by force.

XI. 1 A regular war, that is, one, on both sides public and declared, as it has other peculiarities which exist in external rights, so has it this; that what is promised in the course of such a war, or for the purpose of ending it, is of such validity, that it cannot be rendered void by the allegation of fear unjustly impressed, contrary to the will of the promiser. For as many other things, although not free from

tuntur adeo sint valida, ut ex causa metus injuste illati, invito eo cui promissa sunt, in irritum deduci non possint: quia sicut alia multa quantumvis vitio non carentia ex jure gentium pro justis habentur, [l]ita et metus qui tali bello utrinque infertur. Quod ni id placuisset, bellis talibus quæ valde sunt frequentia nec modus, nec finis potuisset imponi: quod tamen fieri interest humani generis. Et hoc potest intelligi jus illud esse bellicum quod cum hoste servandum ait Cicero, cui et alibi dictum, hostem in bello jura retinere, scilicet non tantum naturalia, sed et quædam ex gentium consensu orta. *De Off.* iii. 29. *Verr.* iv. 55.

2 Neque tamen hinc sequitur, eum qui tale quid bello injusto extorsit, salva pietate, salvis viri boni officiis, posse retinere quod accepit, aut etiam cogere alterum, ut stet pactis sive juratis sive injuratis. Intus enim et ipsa rei natura id injustum manet: neque interna hæc injustitia actus tolli potest, nisi ex novo et vere libero consensu.

XII. Ceterum quod metum dixi haberi pro justo qui bello solenni infertur, [m]de eo metu intelligi debet quem jus gentium non improbat. Nam si stupri inferendi metu extor-

compositione pacis.

[m] *De eo metu intelligi debet, quem jus gentium non improbat*] Sic nihil prodest extorquenti promissio, quam legato capto is extorsit. Mariana xxx. [Cap. 12 et 19. Sed exemplum non

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blame in general, are, in such a war, made lawful by the Law of Nations, so among them, is the fear which is in such a war impressed by each side upon the other. If this were not the acknowledged rule, such wars, which are very frequent, could neither be moderated nor ended; while yet it is the interest of the human race that they should be so. And this is to be understood to represent the rights of war, which, Cicero says, are to be kept with enemies; who too says elsewhere, that an enemy in war has his rights; that is, not only natural rights, but others arising from the agreement of nations.

2 But yet it does not follow from hence, that he who has extorted such promise in an unjust war can retain what he has received, with no violence to piety and the duty of a good man: nor even that he can compel the other to stand by his compacts, made with or without an oath. For internally, and by the nature of the thing, it remains unjust; and this internal injustice of the act cannot be taken away, except by a new and truly free consent.

XII. But when I say that the fear which is impressed in a regular war is held to be just, I must be understood to speak of such fear as the Law of Nations does not condemn. For if anything be ex-

tum sit quippiam, aut alio terrore contra datam fidem, verius erit rem constitutam intra jus naturale: quia jus gentium ad talem metum suam vim non porrigit.

XIII. 1 Servandam autem fidem etiam perfidis et nos
Lib. ii. 13. § 16. in generali tractatione supra diximus; et idem docet Ambro-
Offic. i. 29. sius: quod haud dubie porrigendum ad hostes quoque perfidos: quales Pœni, quibus Romani fidem sancte servaverunt. *Se tunc Senatus, non eos quibus hoc præstabatur aspexit,*
Lib. vi. 6. n. 3. ait in hoc argumento Valerius Maximus. Et Sallustius: *bellis*
Bell. Catil. c. 50. *Punicis omnibus, cum sæpe Carthaginienses et in pace et per inducias multa nefanda facinora fecissent, nunquam ipsi per occasionem talia fecere.*

Bell. Hisp. p. 288. 2 Appianus de Lusitanis fœdifragis, quos Sergius Galba nova pactione deceptos trucidaverat: ἀπιστίᾳ μὲν ἄρα ἀπιστίαν μετιὼν, οὐκ ἀξίως δὲ Ῥωμαίων μιμούμενος βαρβάρους· *perfidia perfidiam ultus contra Romanam dignitatem barbaros imitabatur.* Eoque nomine idem Galba postea a Libone
Lib. viii. 1. n. 2. tribuno plebis accusatus est: quam rem narrans Valerius Maximus, *misericordia,* inquit, *illam quæstionem, non æquitas rexit*[5] (male editur *texit*)*: quoniam quæ innocentiæ tribui*

quadrat. Vide Notas nostras Gallicas. *J. B.*]

[5] Nescio qua Editione usus fuerit Auctor. Certe ejus ævo jam legebatur

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torted by the fear of having the chastity of women violated, or by any other terror contrary to good faith, it is more true that the matter remains subject to Natural Law; for the Law of Nations does not extend its countenance to such fear.

XIII. 1 We have above said, that faith is to be kept even with the perfidious; and Ambrose teaches the same. And this is undoubtedly to be extended also to perfidious enemies; such as were the Carthaginians, to whom the Romans religiously kept their faith. *The Senate looked to itself, not to those to whom the performance was made,* says Valerius Maximus. And Sallust says the like.

2 Appian says of the faith-breaking Lusitanians, whom Sergius Galba deceived by a new convention, and so put to death, that *he avenged perfidy by perfidy, and, in a way contrary to the Roman dignity, imitated the barbarians.* And on that ground, this Galba was afterwards brought under accusation by Libo, the tribune of the people; and then, as Valerius Maximus remarks, *The question was not determined by justice but by mercy; and the acquittal which could not be given to his innocence, was granted out of regard to his children.* Cato, in his *Origines,* had written, on this occurrence, that except he had had recourse to tears and children, he would have been condemned.

non poterat absolutio, respectui puerorum data est. Cato in *Originibus* scripserat, nisi pueris et lacrymis usus esset, pœnas eum daturum fuisse. Cic. *de Orat.* i. 53. et *Bruto*, c. 20.

XIV. Sed simul sciendum est, duobus modis fieri posse ut quis a perfidia vacet, nec tamen id faciat quod promissum est, defectu scilicet conditionis, et per compensationem. Defectu conditionis non vere liberatur promissor, sed eventus ostendit nullam esse obligationem, ut quæ non nisi sub conditione contracta erat. Et huc referendus casus, si prior alter non implerit quod ex sua parte implere tenebatur. Nam unius ejusdemque contractus capita singula alia aliis inesse videntur per modum conditionis, quasi expressum esset, hæc ita faciam si et alter faciat quæ promisit. Ideo Tullus Alba- Apud Liv. i. 22. nis respondens, *Deos testes facit, uter prius populus res repetentes legatos aspernatus dimiserit, ut in eum omnes expetant clades belli. Non tenebitur pro socio,* ait Ulpianus, *qui* L. 14. D. *pro socio.* *ideo renunciavit, quia conditio quædam qua societas erat inita ei non præstatur.* Hanc ob causam quoties alia mens est, solet diserte poni, ut si contra hanc aut illam partem quid fiat, cetera non eo minus rata maneant.

heic *rexit.* Saltem ita habet Editio Wecheliana, ann. 1627, a Christophoro Colero curata. *J. B.*

XIV. But at the same time it is to be remarked, that there are two ways in which the promiser may be blameless of perfidy, though he does not perform what he had promised; namely, by defect of the condition, and by compensation.

By defect of condition, the promiser is not truly liberated from a promise, but the event shews that there was no obligation, since it was contracted only under the condition. And to this head is to be referred the case in which the other party has not fulfilled what, on his part, he was bound to fulfil. For in a contract of that kind, each article implies the others in the way of condition; as if it had been expressed by saying, I will do so and so if the other does what he has promised. So Tullus, answering the Albans, says that he calls the gods to witness that, *Whichever people shall first reject and dismiss the ambassadors who come and ask for restitution, on it shall fall all the calamities of the war.* Ulpian says, *He is not to be held as an ally who renounced the treaty because some condition on which the alliance was agreed to was not performed.* On this account, if the intention of the treaty be different from this, it is usually clearly expressed, that if anything be done contrary to this or that part, the other parts still remain valid.

Lib. ii. 7. § 2. XV. [n] Compensationis originem alibi indicavimus, cum diximus nos, si quod nostrum est, aut quod nobis debetur, consequi aliter non possumus ab eo, qui nostrum habet, aut nobis debet, tantundem in re quavis accipere posse: unde sequitur, ut multo magis possimus id, quod penes nos est, sive corporale est, sive incorporale, retinere. Ergo quod promisimus poterit non præstari, si non amplius valet quam res nostra quæ sine jure est penes alterum. [o] Seneca libro *de Beneficiis* sexto: *sic debitori suo creditor sæpe damnatur, ubi plus ex alia causa abstulit quam ex credito petit. Non tantum inter creditorem et debitorem judex sedet qui dicat. Pecuniam credidisti. Quid ergo? . . . agellum quem non emeras possides: æstimatione facta debitor discede, qui creditor veneras.*

XVI. Idem erit si ex alio contractu is quicum negotium est, plus aut tantundem debet, idque ego aliter consequi non valeo. In foro quidem, ut [p] idem Seneca ait, actiones quædam separantur, nec confunditur formula: sed illa exempla, ut ibidem dicitur, certis legibus continentur, quas necesse est

[n] *Compensationis originem alibi indicabimus*] Tertullianus *Scorpiaco: nulli compensatio invidiosa est, in qua aut gratiæ aut injuriæ communis est ratio.* (Cap. 6.)

[o] *Seneca libro de Beneficiis* VI.]

XV. Compensation, as to its origin, we have elsewhere explained; when we said that if there be anything which is ours, or which is owing to us, and which we cannot otherwise obtain from him who has it, or owes it, we may take a thing of equal value in any other shape. From whence it follows, that we may, still more, retain what we have in our hands, whether corporeal or incorporeal. Therefore, that which we have promised, we may be excused from giving, if it be not of more value than our property which is unjustly detained by another. Seneca says, *So the creditor is often brought in debtor to his debtor, when he has taken away more in another shape than he seeks as a debt. The judge does not merely look at the single debt; but says, You lent him money; what then? you have plate* of his which you never paid for. Let a balance be struck, and you go away as a debtor, who came as a creditor.*

XVI. The same will be the case, if he with whom the question is, owes me more, or as much, from another contract, and I cannot get it any other way. In the court of justice indeed, as Seneca also says, actions at law are kept separate, and the mode of claiming one and the other are not mixed together. But such examples, as he

* Grotius reads *agellum*, Gronovius, *argentum*.

sequi: lex legi non miscetur: eundum est qua ducimur. Jus gentium ista discrimina non agnoscit, ubi scilicet alia juris sui obtinendi spes non est.

XVII. Idem dicendum erit si qui promissum urget non contraxerit, sed damnum dederit. [q]Seneca ibidem: *colonum suum non tenet, quamvis tabellis manentibus, qui segetem ejus proculcavit, qui succidit arbusta, non quia recepit quod pepigerat, sed quia ne reciperetur effecit.* Mox alia addit exempla: *pecus abegisti servum ejus occidisti.* [r]Deinde: *licet me comparare inter se quantum profuerit mihi quisque, aut quantum nocuerit, et tum pronuntiare, utrum plus debeatur mihi, an debeam.*

XVIII. Postremo et quod ex pœna debetur ei, quod promissum est, potest contribui, quod eodem loco late explicatur: *et beneficio gratia debetur, et injuriæ ultio: nec ego* Cap. 5.
gratiam illi debeo, nec ille mihi pœnam: alter ab altero absolvimur: mox: [s]*comparatione facta inter se beneficii et injuriæ, videbo an etiam ultra mihi debeatur.*

XIX. 1 Sed sicut si quid inter litigantes convenerit, ei

Cap. 4.

[p] *Idem Seneca*] Eodem libro, capitibus 6 et 7.

[q] *Seneca ibidem*] Dicto cap. 4.

[r] *Deinde*] Dicto cap. 6.

[s] *Comparatione facta*] Eodem cap. 6.

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there explains, are limited by certain rules, which it is necessary to follow. We must go the way the law points. But the Law of Nations does not acknowledge those distinctions, that is, when there is no other hope of getting our own.

XVII. The same must be said, if he who urges our promise has not made a contract with us, but has inflicted a damage upon us. So Seneca, in the same place, *The landowner is not to have the right of binding the farmer to him, even if the agreement be uncancelled, if he trample down his corn, if he cut down the plants; not because he has received what he agreed for, but because he has himself been the means of his not receiving it.* And he adds other examples: *You have driven off his cattle, you have killed his slave.* And then: *Let me compare what benefit any one has produced me, and what harm, and then pronounce whether more is owing to me or from me.*

XVIII. Finally, that which is due as penalty may be balanced against that which has been promised, which is explained at length in the same place, thus: *Benefit demands recompense, injury, satisfaction; where both occur, I neither owe him recompense, nor he me satisfaction. We are quits with one another. Balancing the benefit and the injury, I shall see whether anything more is due to me.*

XIX. 1 But, as in the case where any agreement has been made

quod promissum est opponi lite manente non poterit, aut actio de qua lis erat, aut litis damnæ et impensæ, ita nec manente bello compensari poterit aut id unde ortum est bellum, aut quidquid bellico gentium jure fieri solet. Negotii enim natura, ne nihil actum sit, ostendit convenisse sepositis belli controversiis: nam alioqui nulla esset pactio quæ non posset eludi: nec forte male huc aptem quod [t]apud eundem, quem jam laudavi aliquoties, Senecam est: *Nullam excusationem receperunt (majores) ut homines scirent fidem utique præstandam. Satius enim erat a paucis etiam justam excusationem non accipi, quam ab omnibus aliquam tentari.*

2 Quæ ergo sunt quæ compensari cum eo quod promissum est poterunt? nimirum si quid alter, quamvis ex alio contractu, inter bellum inito, debet: si damnum dedit intra induciarum tempora: si legatos violavit, aut aliud quid fecit quod inter hostes jus gentium damnat.

3 Observandum tamen ut inter easdem personas fiat compensatio, ac ne jus tertii cujusquam lædatur: ita tamen ut

[t] *Apud eundem, quem jam laudavi aliquoties, Senecam est*] *De Benef.* VII. 16.

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between the two parties to a lawsuit, they cannot, during the suit, set against what was promised, either the original ground of action, or the loss and expense of the suit; so while the war goes on, we cannot bring into the balance, either the original ground of the war, or anything which has resulted from the exercise of the usual belligerent rights. For the nature of the business shews that the convention, in order that it may not be without any effect, must have been made setting aside the controversies belonging to the war itself. For otherwise there could be no convention which might not be eluded. To this we may apply a passage of Seneca: [which however is not very closely to the purpose. W.]

2 What then are the matters, which may be balanced against that which was promised? This for instance; if the other, though from another contract, made during the war, owes us a debt; or if he have committed damage during a time of truce; or if he have violated the rights of ambassadors; or done anything else which the Law of Nations condemns as between enemies.

3 But it is to be observed, that compensation must take place between the same persons who are so bound to each other, and so that the right of a third party be not injured; but still, so that the goods of subjects are understood to be bound for what the state owes, as we have elsewhere said.

4 We must add this also; that it is the part of a generous mind

subditorum bona pro eo quod civitas debet jure gentium obligata intelligantur, ut alibi diximus. Lib. iii. 11. § 2.

4 Addamus et hoc, generosi esse animi stare federibus etiam post aliquid injuriæ acceptum: quo nomine sapiens Indus Iarchas laudabat regem, qui læsus a vicino federato, *οὐ παρέλυσε τοὺς ὅρκους, οὕτω βεβαίως ὀμωμοκέναι φήσας, ὡς μηδὲ ὁπότε ἠδικεῖτο λυπεῖν αὐτὸν, non discessit a jurata fide, aiens tam sancte se jurasse, ut alteri ne post acceptam quidem injuriam nociturus esset.* Philos. iii. 9.

5 Quæ vero de fide hostibus data incidere solent quæstiones, ferme omnes solvi possunt, si adhibeantur regulæ supra traditæ, cum de vi, tum quorumvis promissorum, tum speciali jurisjurandi, federis ac sponsionum, et de regum jure ac obligatione, deque ambiguis interpretandis dissertavimus. Tamen ut et antedictorum usus sit manifestior, et si quid præterea controversi est discutiatur, specialium quæstionum frequentiores atque illustriores attingere non pigebit. Lib. ii. 11, 13, 15, 16.

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to stand to agreements, even after an injury has been received; on which grounds Iarchas, the wise Indian, praised a king who, having been injured by a neighbour who was under league to him, did not swerve from the faith which he had sworn, saying that *he had sworn so solemnly that he could not hurt the other even after receiving the injury.*

5 The questions which commonly occur with regard to keeping faith with enemies, may almost all be solved, by applying the rules given above, concerning the force, both of promises in general, and of oaths in particular, the effect of conventions and securities, the rights and obligations of kings, and the interpretation of ambiguities. But that the use of what has been said may be the more manifest, and that, if there be any remaining controversies, they may be discussed, we shall not hesitate to take the trouble of touching upon the more frequent and more celebrated of special questions.

CAPUT XX.

DE FIDE PUBLICA QUA BELLUM FINITUR, UBI DE PACIS PACTIONE, DE SORTE, DE CERTAMINE CONDICTO, DE ARBITRIO, DEDITIONE, OBSIDIBUS, PIGNORIBUS.

I. INTER hostes quæ conveniunt, fide aut expressa, aut tacita constant. Fides expressa aut publica est, aut privata. Publica aut summarum potestatum aut inferiorum.

CHAPTER XX. *Of the public Faith by which Wars are terminated; and herein, of Treaties of Peace; of Lot; of Combat by Agreement; of Arbitration; of Surrender; of Hostages; and of Pledges.*

I. Conventions between enemies depend either on express engagements, or on tacit ones. An express engagement is either public or private. A public engagement is either one made by the supreme

Quæ summarum est potestatum, aut bello finem imponit, aut eo manente vim habet. In his quæ bellum finiunt spectantur principalia et accessiones. Principalia sunt ipsa quæ bellum finiunt, sive actu suo, ut pactiones, sive ex consensu ad aliud relato, ut sortes, prælii exitus, arbitri pronuntiatio: quorum illæ mere sunt fortuitæ, alia duo casum temperant cum viribus animi aut corporis, aut cum facultate judicante.

Vide Lib. ii. 15. § 3.

II. Pactiones inire, quæ bellum finiant, eorum est quorum est bellum: rei enim suæ quisque moderator. Unde sequitur ut in bello utrinque publico hoc eorum sit, qui summi imperii exercendi jus habent. [a]Regis igitur hoc erit in statu vere regio, modo is rex etiam jus habeat non impeditum.

Vide Lib. i. 3. § 24.

III. 1 Nam rex qui ætatis est ejus, quæ judicii maturitatem non habet, (quod in regnis aliquibus lege definitur, alibi probabilibus conjecturis erit æstimandum) qui imminutæ mentis est, pacem facere non potest. Idem dicendum est [b]de rege captivo, si modo regnum ex consensu populi ortum habet: non enim credibile est a populo imperium delatum ea lege, ut et a non libero exerceri possit. Ergo et hoc casu

[a] *Regis igitur hoc erit*] Mariana xxi. 1.

[b] *De rege captivo*] Vide Guicciardinum Lib. xvi. et Lib. xviii. non semel.

[c] *Non quidem jus totum*] Arumæus in aureæ bullæ discursu: *Rudolphus Palatinus metu in Angliam profugerat, Henricus Moguntinus a Treverensi vi*

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powers, or by inferior powers. An engagement made by the superior powers either puts an end to the war, or is of force while the war goes on. In those which end the war, we are to look at the principal matters, and at the accessories. The principal pacts are those which end the war either by their own act, as convention, or by consent having reference thereto, as lot, the event of a combat, the decision of an arbiter: of which the first is merely casual; the other two, temper chance with the powers of the body or the mind, or with the exercise of judgment.

II. To make conventions which terminate the war, is the office of those who make the war; for each person is the manager of his own affairs. Whence it follows, that in a war public on both sides, this is the office of those who have the right to exercise supreme authority. In a monarchical state, it is therefore the office of the monarch, provided he be a monarch who has a right not impeded in such acts.

III. 1 For a king who is not of the age which implies maturity of judgment, (which age is, in some kingdoms, defined by law, in others, is to be estimated by probable conjecture,) or who is of weak

imperii [c]non quidem jus totum, sed exercitio et quasi tutela erit penes populum, aut eum cui id populus commiserit.

2 De his tamen quæ privatim sua sunt si quid pepigerit rex etiam captivus valebit, ad exemplum eorum quæ de privatis conventionibus dicemus. Quod si exul sit rex, [d]pacemne facere poterit? sane, si constet eum non obnoxium vivere: ceteroqui parum a captivo sors ejus distabit: nam sunt et laxæ custodiæ. Regulus sententiam in senatu dicere recusavit, dicens, quamdiu jurejurando hostium teneretur, non esse Cic. *de Off.* iii. 27. se senatorem.

IV. In procerum aut populi imperio jus paciscendi erit penes majorem partem, illic consilii publici, hic civium sententiæ dicendæ jus ex more habentium, secundum ea quæ diximus alibi. Itaque sic pacta obligabunt etiam eos qui aliter senserunt. Lib. ii. 5. § 17. Livius: *ubi semel decretum erit, omnibus id, etiam quibus ante displicuerit, pro bono atque utili fœdere defendendum.* Lib. xxxii. 20. Dionysius Halicarnassensis: δίκαιον πείθεσθαι τοῖς ὑπὸ πλειόνων κριθεῖσιν· *parendum his quæ pars major censuerit.* Lib. xi. 56. Appianus: δεῖ πάντας τὸ κριθὲν ἀπροφασίστως Immo Polyb. v. 49.

erat ejectus. Electuram tamen eo non perdidere.

[d] *Pacemne facere poterit*] Lucanus:

Veios habitante Camillo
Illic Roma fuit. *Phars.* v. 28.

Vide Chassanæum *de Gloria Mundi* parte v. consid. 49.

intellect, cannot make peace. The same is to be said of a king in captivity, provided he received his sovereignty from the people; for it is not to be supposed that they would bestow the power, to be used by a person who was not free. Hence, in this case, the sovereignty, not indeed as to its whole rights, but as far as exercise and guardianship, will be with the people, or him to whom the people commits it.

2 But as to things which belong to himself, if a king, even in captivity, make any compact, it will be valid, according to the example of private conventions, of which we have spoken. But if the king be an exile, can he make peace? Yes, if he is under no constraint; otherwise, his condition differs little from that of a captive: for the custody of a captive is often lax. Regulus refused to deliver his opinion in the Senate, saying that so long as he was under an oath to the enemy, he was not a senator.

IV. In an aristocratical or democratical state, the right of making treaties will be with the majority, respectively, of the Council, and of the Assembly of citizens who have a vote, as we have elsewhere said. Therefore conventions so made, bind them also who dissented.

ποιεῖν· *omnes decreto obsequi tenentur, nulla admissa excusatione.* Plinius: *quod pluribus placuisset, cunctis tenendum.* Quos autem obligat pax, iisdem et volentibus prodest.

Lib. vi. *epist.* 13.

Vasq. *contr. ill.* i. 4. *ibi multos allegat*, et c. 5. *vide supra*, ii. 6. § 3. *et seqq.*

V. 1 Nunc de rebus pactioni subjectis videamus. Imperium aut omne, aut ejus partem reges, quales nunc sunt plerique, regnum habentes non in patrimonio sed tanquam in usufructu, paciscendo alienare non valent. Imo antequam regnum accipiant, quo tempore populus adhuc ipsis superior est, lege publica tales actus in futurum plane irriti reddi possunt, ita ut nec ad id, quod interest, obligationem pariant. Atque id populos voluisse credibile est, ne alioqui si ad id quod interest salva esset actio contrahenti, subditorum bona pro debito regis caperentur, ac sic de non alienando imperio vana esset cautio.

2 Ergo ut imperium totum valide transeat, populi totius consensu opus est, qui expediri potest per partium legatos quos Ordines vocant. Ut pars aliqua imperii valide alienetur duplici opus est consensu, et corporis, et specialiter ejus partis, de qua agitur, ut quæ invita a corpore cui coaluit avelli ne-

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So Livy; Dionysius; Appian; Pliny. And those who are bound by the peace, also may share its advantages.

V. 1 Let us now consider what things may be the subjects of convention. The royal authority, or any part of it, cannot be alienated by convention by kings, such as most kings now are, having their authority not as a patrimony, but as a life estate. Indeed before they received the royal authority, at which time the people was superior to them, there might have been a law made to render such acts invalid in all future time, so that they should not produce any obligation at all, even for compensation for non-fulfilment. And it is to be believed that the people intended this; since, if the action was valid to the contractor for compensation, the goods of the subjects might be taken for the debt of the king; and thus, the provision against alienating the royal authority might be defeated.

2 Therefore, that the whole royal authority may pass in a valid manner, it is necessary to have the consent of the whole people; which may be effected by the representatives of different classes, whom they call the Orders or the Estates of the realm. That any part of the empire may be alienated, there is need for a double consent; both of the general body, and of that special part which is under question; since it cannot, without its own good-will, be separated from the body of which it was a part. But the part itself may transfer to itself the sovereign authority, without the consent of the

queat. Sed pars ipsa tamen valide in se imperium transscribet sine populi consensu, in summa atque alias inevitabili necessitate, quia eam potestatem credibile est exceptam, cum societas civilis coita est.

3 At in regnis patrimonialibus quo minus rex regnum alienet, nihil impedit. Fieri tamen potest ut talis rex partem aliquam imperii alienare non valeat, si nempe regnum sub onere ejus non dividendi in proprietatem acceperit. Bona vero quæ regni dicuntur quod attinet, possunt et hæc in patrimonium venire regis duobus modis, aut separabiliter, aut individue cum ipso regno. Si hoc modo, transscribi poterunt, sed non nisi cum regno: si illud, etiam seorsum.

4 Qui vero reges in patrimonio regnum non habent, his vix est ut jus regni bona alienandi concessum videatur, nisi diserte id appareat ex primitiva lege, aut more cui contradictum nunquam sit. Lib. ii. 6. § 13.

VI. Sed et quatenus promisso regis populus ac simul successores obligentur, alibi diximus: nempe [e] quatenus obligandi potestas sub imperio comprehensa est: quod nec in infinitum Lib. ii. 14. § 10. *et seqq.* Vid. Vasq. *d. c.* 5. n. 9.

[e] *Quatenus obligandi potestas sub imperio comprehensa est: quod nec in infinitum protrahi, nec ad angustias nimias arctari debet*] Vide Reinking. Lib. I. classe iii. cap. v. num. 30. Vide et supra Lib. II. cap. xiv. § 11 et 12.

people, in an extreme and otherwise inevitable necessity; because it is to be supposed that that power was excepted from the compact in such a case, when civil society was formed.

3 But in patrimonial kingdoms, there is nothing which prevents the king alienating his kingdom. Still, it may be, that such a king has not power to alienate any part of the empire; namely, if he had received the kingdom as his property, with the *onus* of not dividing it. As to the valuables which are called the Property of the Crown, they may come into the king's patrimony in two ways; either separably, or inseparably with the kingdom itself. If in the latter mode, they may be transferred, but only with the kingdom; if in the former, they may be transferred separately.

4 As to kings whose kingdom is not patrimonial, they can hardly have the right of alienating the property of the crown; except it appear plainly to be so, from a primeval law or uncontradicted custom.

VI. How far the king's successors, and the people, are bound by his promise, we have also stated elsewhere; namely, so far as the power of so obliging was included in the royal authority; which is neither to be infinitely extended, nor too much narrowed; but regu-

protrahi, nec ad angustias nimias arctari debet, sed ita intelligi ut valeat quod probabili ratione nititur. Plane aliud erit si quis rex simul subditorum dominus sit, neque tam civile quam familiare imperium acceperit: ut qui bello victos in servitutem redigunt: aut si in personam quidem dominium non habeat, sed in res habeat, ut Pharao in terra Ægypti ex emto, et alii qui advenas in suum privatum receperunt. Nam hic jus præter regium accedens efficit ut ex eo consistat, quod alioqui per se solo regio jure consistere non posset.

Supra iii. 8. § 2.

VII. 1 Disputari et hoc solet, quid in res singulorum possint pacis causa statuere, qui reges sunt, nec in res subditorum aliud jus habent quam regium. Alibi diximus [f] res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quæ privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedere illi ipsi voluisse censendi sunt, qui in civilem cœtum coierunt.

Vasq. i. 5. *Rom. cons.* 310. Sylv. *in verb. bell.* i. § 43.

2 Sed addendum est, id cum fit, civitatem teneri his, qui suum amittunt, sarcire damnum de publico, in quod publicum

[f] *Res subditorum sub eminenti dominio esse civitatis*] Gail. II. obs. 57.

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lated by fair reasons. It is plainly another matter, if the king be the absolute master of his subjects, and have received a domestic rather than civil authority; as in the case of those who reduce a conquered people to slavery; or if, without having such dominion over their persons, they have it over their goods; as Pharaoh king of Egypt, by purchase; and others, who have received new comers into their private property. For here, another kind of right, added to the regal rights, produces a result which the regal rights of themselves could not produce.

VII. 1 This is also a common question; what may be done for the sake of peace, with the goods of individuals, by kings who have no other right over the property of subjects than the regal right. We have elsewhere said, that the property of subjects is under the eminent dominion of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.

2 But it is to be added, that when this is done, the state is

nomen et ipse, qui damnum passus est, si opus est, contribuet. Neque hoc onere levabitur civitas, si nunc forte ei præstationi par non sit, sed quandocumque copia suppetit, exseret sese quasi sopita obligatio.

VIII. Neque illud indistincte admitto, quod dicit Ferdinandus Vasquius, agnoscere civitatem non debere id damnum, quod jam bello datum est, eo quod jus belli talia permittat. Nam jus illud belli populos alios spectat, ut alibi exposuimus: partim et hostes inter se, non cives inter se, qui cum socii sint æquum est ut communia habeant damna, quæ societatis causa contingunt. Plane civili lege et hoc constitui poterit, ut rei bello amissæ causa nulla adversus civitatem actio sit, ut sua quisque acrius defendat.

Lib. i. *cont. ill.* c. 4. *in fin.*

Lib. iii. 6. § 2; x. § 5.

L. cum duob. 52. § *quid.* 4. *D. pro socio.*

IX. Sunt qui latum discrimen collocant inter ea, quæ civium sunt ex gentium jure, et ea quæ eorundem sunt ex jure civili, ut in hæc jus laxius regi concedant, etiam auferendi sine causa et compensatione, in illa non item: perverse: nam dominium ex qualicunque causa ortum sit, suos semper effectus habet ex ipso jure naturali, ut scilicet auferri nequeat nisi ex

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bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute. Nor is the state relieved from this *onus*, if, for the present, it be unable to discharge it; but at any future time, when the means are there, the obligation which had been suspended revives.

VIII. Nor do I admit, without distinction, what Vasquius says; that the state is not bound to acknowledge the damage which is inflicted by war, because the right of war permits such damage. For that right of war has regard to other peoples, as we have elsewhere explained; and, partly at least, affects enemies in their mutual relations, not citizens in theirs; for since these are socially bound together, it is just that they bear in common the losses which happen for the sake of society. It may however be established by the Civil Law, that a thing lost in war shall not give a citizen a right of recovery against the State; in order that each person may the more strenuously defend his own property.

IX. There are some writers who make a broad distinction between things which belong to the citizens by the Law of Nations, and things which belong to them by the Civil Law: so that with regard to the former, they allow a looser right to the king, so that he may take them without cause and without compensation; but not so with regard to the latter. Wrongly. For ownership, from whatever cause it

causis quæ aut dominio insunt suapte natura, aut ex dominorum facto ortum habent.

X. Sed hæc inspectio, ne nisi ex publica utilitate res privatorum concedantur, regem spectat et subditos, ut illa de damno sarciendo civitatem et singulos. Nam externis, qui cum rege contrahunt, sufficit factum regis, non tantum ob præsumtionem quam secum adfert dignitas personæ, verum
Lib. iii. 11. etiam ob gentium jus, quod bona subditorum obligari ex facto regis patitur.

XI. 1 Circa interpretandas pacis conventiones observan-
Lib. ii. 16. §§ 11, 12. dum est quod supra a nobis est traditum, quo quidque plus habet favoris, eo laxius accipiendum; quo longius abit, eo restrictius. Si jus naturæ merum spectamus, maximus favor in eo esse videtur ut suum quisque consequatur, quod Græci dicunt ἕκαστον ἔχειν τὰ ἑαυτοῦ, et proinde videtur ambigue positorum interpretatio eo ducenda, ut qui justa arma habuit id consequatur ob quæ arma sumsit, et damna sumtusque recuperet: non item ut pœnæ nomine quicquam lucretur, id enim est odiosius.

2 Sed quia ad pacem veniri vix solet injuriæ confessione,

[g] *Ut quarum rerum turbata bello possessio est, ex formula juris antiqui componatur*] Vide Parutam Lib. v.

[h] *Transfugas jure belli recipimus*]

arises, has always its effects by Natural Law; in so far that it cannot be taken away, except either from causes which belong to the very nature of ownership, or arise out of the act of the owners.

X. But this consideration, that the property of private parties is not to be given up, except on the ground of public utility, regards the king and his subjects; the other consideration, respecting compensation for loss, regards the state and individuals. For as regards strangers who contract with the king, the act of the king is sufficient; not only on account of the presumption of due authority which the dignity of the person implies; but also from the Law of Nations, which allows the goods of subjects to be bound by the act of the king.

XI. 1 With regard to the interpretation of conventions of peace, we must observe what has been delivered above that; in proportion as any condition is more favourable, it is to be taken more loosely: in proportion as it is the contrary, more restrictedly. If we regard mere Natural Law, the most favourable condition seems to be, that each shall obtain his own: and therefore the interpretation of doubtful expressions is to be drawn to that sense; that he who has taken up arms justly, shall obtain that for which he went to war, and recover his losses and expenses; but not that he shall obtain anything under the plea of penalty; for that is more odious.

ideo ea sumenda est in pactis interpretatio, quæ partes quoad belli justitiam quam maxime æquet: quod fieri solet duobus maxime modis: aut [g] ut quarum rerum turbata bello possessio est, ex formula juris antiqui componatur: (quæ verba sunt Menippi in oratione qua de federum generibus disserit) aut ut res maneant quo sunt loco: quod Græci dicunt ἔχοντες ἃ ἔχουσι.

Liv. xxxiv. 57.

XII. 1 Ex his duobus posterius in dubio magis est ut præsumatur, quia facilius est, et nullam inducit mutationem. Hinc est illud quod a Tryphonino notatum est, ut in pace illis demum captivis postliminium sit de quibus id in pactis erat comprehensum, ut recte emendare Fabrum diximus supra, et certis argumentis evicimus. Sic et transfugæ non reddentur nisi convenerit. Nam [h] transfugas jure belli recipimus: id est, per jus belli licet nobis admittere et nostris asscribere eum qui partes mutat. Res ceteræ tali pacto manent penes tenentem.

L. in bell. 12. *D. de captiv.*

Supra hoc lib. c. 9. § 4.

L. transf. 51. *D. de acq. rer. dom.*

2 Illud autem *tenere* non civiliter sed naturaliter sumitur: in bellis enim sufficit facti possessio, nec alia attenditur. Agros autem diximus ita teneri si munitionibus quibusdam

Dec. T. iii. *cons.* 74. *Supra* Lib. iii. 6. § 4.

Supra hoc libro cap. 1. in fine: in pace convenire et hoc solet, ne transfugæ recipiantur. Vide pacem Justiniani cum Chesroë apud Menandrum Protectorem. (Pag. 118. *Ed. Hæschel.*)

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2 But since parties will hardly come to peace by one side confessing to being in the wrong, therefore that interpretation is to be taken which puts the parties, as much as possible, on an equality with respect to the justice of the war. And this is done mainly in two ways; either that the possession which has been disturbed by war should be restored, as expressed by the formula *in statu quo ante bellum;* or that matters remain as they are, which is expressed by *uti possidetis.*

XII. 1 Of these two rules, the latter is, in a doubtful case, to be preferred, as being the easier, and inducing no change. Hence the rule of Tryphoninus; that in peace, those prisoners only shall have *postliminium* for whom such a compact was made; which, as we have shewn above, is the true reading. And thus, deserters are not to be given up, except this be agreed upon; for we receive deserters by the laws of war: that is, by the laws of war it is lawful for us to admit and enrol in our numbers him who changes his side. Other things, on such agreement, remain with the person who is in possession.

2 But this *possession* is taken not according to Civil but to Natural Law; for in war, the fact of possession suffices, and nothing else is attended to. And we speak of lands, as in possession, if they are pro-

clausi sunt: nam temporariam insessionem ut per stativa hic Pag. 316 B. non spectari. Demosthenes pro Ctesiphonte festinatum ait a Philippo, ut quæ posset loca occuparet, gnarus ut res erat, pacis confecto negotio, retenturum se quæ teneret. Incorporalia non tenentur nisi per res, quibus adhærent, ut servitutes *Supra* iii. 7. § 4. prædiorum, aut per personas quarum sunt, dum ne in solo quod hostium fuit exercenda sint.

XIII. In altero illo paciscendi genere, quo restituitur possessio bello turbata, notandum est, ultimam, quæ ante bellum fuit, possessionem respici, ita tamen ut privatis dejectis interdicto aut vindicatione apud judicem experiri liceat.

XIV. At si quis sui juris populus sponte se bellantium alteri subjecerit, ad eum restitutio non porrigetur, ut quæ ad ea tantum pertineat, quæ vi, metu facta sunt, aut alioqui et dolo non nisi in hostem licito. Sic pace inter Græcos Thebani [1] Platæam retinuerunt, dicentes: *οὐ βίᾳ ἀλλ' ὁμολογίᾳ αὐτῶν προσχωρησάντων, καὶ οὐ προδόντων, ἔχειν τὸ χωρίον· habere se eum locum non vi, non proditione, sed eorum quorum erat libera voluntate.* Parique jure Nisæa penes

[1] *Platæam retinuerunt*] Locus hic est apud Thucydidem v. (cap. 17.) Præcesserat similis Lib. III. *μὴ ἀνάδοτος εἴη ἡ Πλάταια, ὡς αὐτῶν ἑκόντων προσχωρησάντων· ne reddenda sit Platæa, cum ejus urbis homines sponte accesserint.*

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tected by fortifications; for a temporary occupation, or an encampment, is not here regarded. Demosthenes says that Philip made haste to occupy what places he could, knowing that when peace was made, he would keep what he held. Incorporeal possessions are not held, except by means of the thing to which they adhere; as the servitudes of lands; or by the persons to whom they belong, provided they are not such as are to be exercised in the soil which had been the enemy's; [for then they go with the soil].

XIII. In the other kind of pacification, the *status quo ante bellum*, it is to be noted that the last possession which preceded the war is meant; but in such a way, that private encroachments are to be set aside by an order of court, or sentence of a judge, when it can be had.

XIV. But if any people, which is its own master, has, of its own free will, subjected itself to one of the belligerent parties, the restitution is not to be extended to it, since the restitution applies to those things which are done by force or fear, or by some stratagem lawful towards an enemy. So when the Greeks made peace, the Thebans retained Platæa; saying, that *they had not taken it by force, nor by treachery, but by the free will of those whose it was.* And on the like grounds, Nisæa remained in the possession of the Athenians. T. Quinc-

Athenienses mansit. Eadem distinctione adversus Ætolos utebatur T. Quinctius. *Captarum*, inquiens, *urbium illa lex. Thessaliæ civitates sua voluntate in ditionem nostram venerunt.* Liv. xxxiii. 13.

XV. Si nihil aliud convenerit, omni pace id actum censeri debet, ut quæ bello data sunt damna, eorum nomine actio non sit: quod de damnis etiam privatim acceptis intelligendum est: nam et hæc belli effecta sunt. In dubio enim ita censentur contrahere voluisse bellantes, ut neuter injustitiæ damnaretur.

XVI. Non tamen et quæ privatis deberi cœperunt belli tempore condonata censeri debent, nam hæc non belli jure quæsita sunt, sed bello tantum exigi vetita. Itaque sublato impedimento vim suam retinent. Jus vero quod ante bellum fuit, quanquam nemini facile ademtum censeri debet, (hanc enim ob causam maxime ut sua tenerentur res publicæ civitatesque constitutæ sunt, ut recte ait Cicero) intelligendum id tamen de eo jure quod ex rerum inæqualitate nascitur. *Dec. cons.* 61. *L.* ii. *de Offic.* c. 21.

XVII. [k] De jure ad pœnas non æque: nam id jus, quate-

[Cap. 52. In iis autem, quæ statim sequuntur post locum primum, legitur quoque quod Auctor ait de Nisæa.]

[k] *De jure ad pœnas non æque*] Gail. *de Arrestis* c. xiv. n. 7.

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tius used the like distinction towards the Etolians, saying, that *this was the law of captured cities: the Thessalian cities have by their own will come under our authority.*

XV. If no other convention is made, in every war it is to be supposed to be settled, that the losses which have been caused by the war are not liable to be recovered. And this is to be understood also of losses to private persons; for these are the effects of war. For in a doubtful matter, the contracting belligerent parties are to be supposed to have intended that neither should be condemned as unjust.

XVI. But debts which were due to private persons at the time of the war breaking out, are not to be supposed cancelled; for these are not acquired by the right of war, but only prevented by war from being exacted. And therefore, when the impediment is removed, they retain their force. But though the right which existed before the war, is not lightly to be supposed to be taken from any one, (for on this account mainly were states established, that each person might have his own, as Cicero rightly says), yet this is to be understood of rights which result from an inequality which requires to be balanced.

XVII. Not therefore of a public right to a penalty. For that

nus inter ipsos reges aut populos versatur, remissum ideo censeri debet, ne pax non satis pax sit, si veteres ad bellum causas relinquat. Quare et ignorata hic venient sub verbis generalibus, ut de mercatoribus Romanis quos a Carthaginiensibus mersos ignorabant Romani, narrante Appiano. *κράτισται διαλλαγαὶ ἐν αἷς οὐδέν ἐστιν ἔγκοτον οὐδὲ μνησίκακον,* inquit Dionysius Halicarnassensis: *optimæ conciliationes quæ iram et offensarum memoriam delent.* Isocrates Plataica: *εἰρήνης οὔσης οὐ προσῆκε μνησικακεῖν περὶ τῶν τότε γενομένων· in pace non decet ante peccata exequi.*

Antiq. Rom. iii. 8. p. 138. Pag. 299 B.

XVIII. De privatorum jure ad pœnam non tanta est ratio ut remissum censeatur: quia sine bello judiciis expediri potest: tamen cum hoc jus non ita nostrum sit ut quod ex inæqualitate nascitur, et pœnæ semper aliquid odii habeant, levis verborum conjectura sufficiet, ut hoc quoque donatum intelligatur.

XIX. Quod vero diximus, jus quod ante bellum fuit ademtum facile censeri non debere, id in privatorum jure firme tenendum est: in jure autem regum et populorum facilius est ut condonatio aliqua intelligatur facta, si modo verba aut conjecturæ non improbabiles suppetant; maxime vero si jus de quo agitur non liquidum erat, sed in controversia positum. Benig-

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right, as far as it concerns the relations of kings and peoples, must be conceived to be remitted, on this account; that a peace will be no peace, if the old causes of war are left standing. And here, demands which were not known of, will be included in the general words: as with respect to the Roman merchants who had been drowned by the Carthaginians, without the Romans knowing it. *The best pacifications are those which obliterate anger and the memory of offenses,* as Dionysius says. So Isocrates.

XVIII. The rights of private persons to a penalty, do not offer the same reason for being supposed to be remitted; because they might be exacted without the arbitrament of war. But still, since this right is not ours in the same way as one which arises from an inequality, and punishment has always in it something odious, a slight implication of words will suffice to make it understood that such penalties also are to be remitted.

XIX. What we have said, that the right which existed before the war is not lightly to be supposed to be taken away, is to be firmly held with regard to the rights of private persons. In the rights of kings and peoples, we may more easily suppose some condonation to take

num enim est credere id actum, ut belli semina evellerentur. Idem quem modo laudavi Dionysius Halicarnassensis: οὐκ ἀπόχρη τοῦτο μόνον ἡμᾶς σκοπεῖν ὅπως ἂν τὴν παροῦσαν ἔχθραν διαλυσαίμεθα πρὸς ἀλλήλους, ἀλλ' ὥστε μηδ' αὖθις ποτε πολεμήσωμεν ἔτι δεῖ παρασκευάσασθαι· οὐ γὰρ ἀναβολὰς ποιησόμενοι τῶν κακῶν συνεληλύθαμεν, ἀλλ' ἀπαλλαγάς: *non tam cogitandum est de sarcienda in præsens amicitia, quam id curandum ne bello iterum implicemur: neque enim ad differenda sed ad auferenda mala convenimus:* quæ postrema verbo tenus ferme desumta sunt ex Isocrate, *oratione de Pace.* Lib. iii. 9. Pag. 164 c.

XX. Quæ post perfectas pactiones capta sunt, reddenda satis constat, sublatum enim jam erat belli jus.

XXI. At in pactionibus, quæ sunt de reddendis his, quæ bello capta sunt, primum latius interpretandæ quæ mutuæ sunt quam quæ claudicant: deinde quæ de hominibus agunt plus favoris habent quam quæ de rebus: et inter eas quæ de rebus, hæ quæ de agris plus quam quæ de rebus mobilibus: et quæ de his quæ penes publicum sunt plus quam quæ penes privatos: et inter eas quæ penes privatos, plus illæ quæ reddi jubent lucrativo titulo possessa, quam oneroso, ut quæ emtionibus, quæ dotibus tenentur. *Alciat.* v. *Resp.* 17. Cic. *de Offic.* ii. 23.

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place, if there be any words, or fair conjecture, to countenance the suppositions: and this especially, if the right in question be not clear, but controverted. For it is gracious to suppose that to have been done, which plucks up the seeds of war. So Dionysius Halicarnassus, whose concluding words are nearly taken from Isocrates in his oration on the Peace.

XX. What is taken after the treaty is made, is to be restored; for the right of war was previously extinguished.

XXI. In agreements concerning the restitution of captures made in war, in the first place, those articles are to be interpreted more widely, which are mutual, than those which are one-sided; in the next place, those which treat concerning men are to be taken more favourably than those concerning things; and amongst those concerning things, those concerning lands, more favourably than those concerning moveables; and those concerning things in public possession, more favourably than those which are in private; and among those which are in private possession, those which direct the restitution of things possessed by a lucrative title, more favourably than by an onerous title; and those which have been acquired by purchase, more favourably than those by donation.

XXII. Cui pace res conceditur, ei et fructus conceduntur a tempore concessionis, non retro, quod recte defendit Cæsar Augustus contra Sextum Pompeium, qui Peloponneso sibi concessa, simul etiam tributa quæ pro exactis annis debebantur sibi vindicabat.

App. civ. v. p. 716.

XXIII. [l]Nomina regionum accipienda ex usu præsentis temporis, non tam vulgi quam peritorum: nam a peritis negotia talia tractari solent.

XXIV. Habent et illæ regulæ frequentem usum, quoties relatio fit ad pactum antecedens aut vetus, toties repetitas censeri qualitates aut conditiones priore pacto expressas: et pro faciente habendum qui facere voluit, si per alterum, quicum controversia est, stetit quo minus fieret.

Quint. *decl.* cccxliii.

XXV. Quod vero quidam aiunt moræ purgationem intra breve tempus admitti, [m]verum non est, nisi improvisa necessitas impedimento fuerit. Nam quod canones nonnulli purgationi tali favent mirum non est, cum eorum officium sit, Christianos ad ea permovere quæ caritati mutuæ conveniunt.

[l] *Nomina regionum accipienda ex usu præsentis temporis*] Vide Guicciardinum libro v. [in lite de Capitanata inter Francos et Hispanos, quum illi partem esse Aprutii contenderent, hi Apuliæ.]

[m] *Verum non est, nisi improvisa necessitas impedimento fuerit*] Vide Albertum Argentinensem.

[n] *Qui conditiones elocutus est*] Plautus *Persa: tua merx, tua indicatio est.* (IV. 4. 37.) In hac re solet prior loqui

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XXII. If a possession is conceded to any one in a pacification, there are conceded to him the fruits of the possession from the time of concession, but not backwards; a rule which Augustus rightly defends against Pompeius; who, when Peloponnesus was granted to him, claimed, at the same time, the tribute which was due for the years which had elapsed.

XXIII. The names of countries (provinces and the like) are to be taken according to the use of the present time; and the use of the learned, rather than of the vulgar; for these matters are commonly treated by learned men.

XXIV. These rules also are often applicable:—that as often as reference is made to an antecedent or ancient convention, so often the qualities or conditions expressed in the former convention are to be understood as being repeated;—and that a party is to be understood as having done what he wished to do, if his not doing it was occasioned by the other party with whom the controversy is.

XXV. What some say, that for a short time an excuse for delay is to be admitted, is not true, except an unforeseen necessity prevents

At in hac quæstione de pactis interpretandis non jam quærimus quid melius sit, imo nec quid a quoque religio et pietas exposcat; sed ad quid cogi possit, quod totum versatur in eo jure, quod externum diximus.

XXVI. In dubio autem sensu magis est ut contra eum fiat interpretatio, [n]qui conditiones elocutus est, quod esse solet potentioris: (est ejus qui dat non qui petit conditiones pacis [1]dare, ait Annibal) sicut et contra venditorem fit interpretatio: habet enim quod sibi imputet, qui non apertius locutus est: alter autem quod plures sensus recipiebat, id suo jure accipere potuit in partem sibi utiliorem; unde alienum non est quod Aristoteles dixit: διὰ τὸ χρήσιμον τῆς φιλίας οὔσης, ἡ τοῦ παθόντος ὠφέλεια μέτρον ἐστίν· *ubi utilitatis causa amicitia est, ibi ejus qui accipit utilitas ejus quod debetur mensura est.*

L. Veteribus. 39. *D. de pactis.*

Ethic. Nic. viii. 15.

XXVII. Quotidiani usus et illa disputatio est: quando pax rupta censeatur: quod Græci vocant παρασπόνδημα: non enim idem est novam bello causam præbere et pacem rumpere:

is qui plus valet; ut vero petantur conditiones, loqui prior solet qui est infirmior. Plutarchus *Sulla:* τῶν δεομένων ἐστὶ τὸ προτέρους λέγειν· τοῖς δὲ νικῶσιν ἐξαρκεῖ τὸ σιωπᾶν· *eorum est prius loqui qui opus habent pace, victori satis est tacere.* (Pag. 467 c.)

[1] *Dicere*, non *dare*, est apud LIVIUM, qui ita Hannibalem inducit loquentem, Lib. XXX. cap. 30. *J. B.*

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the fulfilment. That some canons favour such excuses is not surprizing, since it is their office to move Christians to such courses as are suitable to mutual charity. But in this question concerning the interpretation of conventions, we do not now require what is best, nor even what religion and piety demand of each party; but what he can be compelled to: and the whole of this question belongs to what we call external right.

XXVI. In a doubtful sense, the interpretation is rather to be made against the party which drew up the conditions, which is commonly the more powerful party; (as Annibal says, *He who gives, not he who asks, must prescribe conditions of peace:*) as in a sale, the interpretation is against the seller; for he has himself to blame for not speaking more plainly: and the other party, if there are several senses to an expression, may fairly receive it in the way most useful to himself. Aristotle says, *Where there is a friendship for the sake of utility, the utility of him who receives the advantage is the measure of what is due.*

XXVII. Also the dispute constantly occurs, When a peace is to be supposed to be broken: for which occasion the Greeks have a special

sed multum inter hæc interest, tum ad committendam pœnam a peccante, tum ad liberandam in ceteris fidem ejus, in quem peccatum est. Rumpitur pax tribus modis, aut faciendo contra id quod omni paci inest, aut contra id quod in pace dictum est aperte, aut contra id quod ex pacis cujusque natura debet intelligi.

XXVIII. Contra id quod omni paci inest fiet, si vis bellica inferatur, nimirum ubi nulla nova subest causa: quæ si probabiliter adferri potest, satius est injustitiam sine perfidia, quam
Lib. i. 123. cum perfidia admissam credi. Illud Thucydidis vix opus habet moneri: λύουσι τὰς σπονδὰς οὐχ οἱ ἀμυνόμενοι, ἀλλ' οἱ πρότεροι ἐπιόντες· [o] *pacem rumpunt non qui vim vi arcent, sed qui priores vim inferunt.* Hoc posito, a quibus, et quibus illata vis armata pacem solvat, videndum est.

XXIX. Qui socii fuerunt si quid tale faciant, pacem rumpi: video esse qui sentiant. Nec nego ita conveniri posse,

[o] *Pacem rumpunt non qui vim vi arcent, sed qui priores vim inferunt*] Vide Ammianum Marcellinum initio libri XXIX. qui sic *de Romanis: opera consulta retro cedentes, ne ferro violarent adversorum quenquam primi, et judicarentur discissi federis rei, ultima trudente necessitate congressi sunt.* Armenii in oratione ad Chosroën apud Procopium *Persicorum* II. (c. 3.) λύουσι μὲν γὰρ τὴν εἰρήνην οὐχ οἳ ἂν ἐν ὅπλοις γένοιντο πρῶτοι, ἀλλ' οἳ ἂν ἐπιβουλεύοντες ἐν σπονδαῖς τοῖς πέλας ἁλοῖεν· *rumpunt pacem non qui primi in armis sunt, sed qui federis tempore deprehenduntur insidiati alteris.* Apud eundem *Vandalicorum* II. Mauri: λύουσι γὰρ τὰς σπονδὰς, οὐχ ὅσοι ἀδικού-

name; for it is not the same thing to give a new occasion to war, and to break the peace. There is a great difference between the two, both as to the penalty incurred by the transgressor, and as to relieving from his engagements the other party. Peace is broken in three ways: either by acting against rules which are involved in every peace; or against that which was distinctly said in this peace; or against that which ought to be understood from the nature of each peace.

XXVIII. A person acts against rules involved in every peace, if he use warlike force; that is, no new cause having arisen. If such a cause can be alleged with probability, it is better to presume that the injustice was committed without perfidy, than with it. (Thucydides says, *They break the peace not who resist force, but who use force*). This being laid down, we must see by whom, and to whom, force employed breaks the peace.

XXIX. If those who have been allies in the war do anything of the sort, the peace is held by some writers to be broken. Nor do I deny that it may be agreed that it shall be so: not, properly, that one person shall be liable to penalty for another person's act; but under

non proprie ut ex alieno facto alius fiat pœnæ obnoxius, sed ut pax non videatur plene inita, sed sub conditione, partim potestativa, partim casuali. Verum hoc modo facta pax, ni manifeste appareat, credi non debet: est enim enorme, et communi pacem facientium voto non convenit: ergo qui vim intulerunt, aliis non adjuvantibus, pacis ruptæ tenebuntur, et in eos bellandi jus erit, non in alios: contra quam Thebani Paus. ix. 1.
aliquando contra Lacedæmoniorum socios dixerunt.

XXX. Si quid subditi per vim armatam faciunt, sine jussu publico, videndum erit an privatorum factum publice probatum dici possit: ad quod tria requiri, scientiam, puniendi potentiam, et neglectum, ex his quæ supra tractavimus facile Lib. ii. 21. § 2. et seqq.
potest intelligi. Scientiam evincunt facta manifesta, aut denuntiata. Potentia præsumitur nisi defectio appareat: neglectum ostendit elapsum temporis spatium, quale in quaque civitate ad crimina punienda sumi solet: Et talis neglectus

μενοι ἐκ τοῦ ἐμφανοῦς τοὺς πέλας κατηγοροῦντες ἀφίστανται, ἀλλ' ὅσοι ὑποσπόνδους ἔχειν ἀξιοῦντές τινας, εἶτα βιάζονται. καὶ τὸν Θεὸν πολέμιόν σφισι ποιοῦνται, οὐχ οἳ ἂν τὰ σφέτερα αὐτῶν κομιούμενοι ἐφ' ἑτέρους χωροῖεν, ἀλλ' ὅσοι τῶν ἀλλοτρίων ἐπιβατεύοντες εἰς κίνδυνον πολέμου καθίστανται·

frangunt pacis federa, non qui injuriis affecti, palamque id dequesti ad alios se transferunt, sed qui, quos federatos habere volunt, violant: Deumque sibi faciunt hostem, non si qui rebus suis secum sumtis ad alios transeant, sed si qui aliena invadentes eorum dominos in belli pericula cogunt. (Cap. 11.)

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a condition of the peace, partly potestative and partly casual. But a peace ought not to be assumed to be made in this way, except it manifestly appear; for such an interpretation is irregular and contrary to the common intention of those who make the peace. Therefore if any have used force, the others not helping them, against them there is a right of war, but not against the others. This is contrary to what the Thebans said against the allies of the Lacedæmonians on a certain occasion. (Paus. ix. 1.)

XXX. If subjects do anything by armed force without public command, it will have to be seen whether the private act can be said to be publicly approved. And to this, three things are requisite, knowledge, power of punishing, and neglect; as may appear from what we have already said. Knowledge is proved by the facts being manifest, or being denounced. Power is presumed, except some reason for its defect appears. Neglect is proved by the lapse of such a time as, in each state, is commonly taken for punishing offenses. And such neglect is equivalent to a positive decree; as Agrippa says in Josephus, that the Parthian king will think that peace is broken, if his subjects

decreto idem valet, nec aliter accipiendum, quod ait apud Josephum Agrippa, regem Parthum arbitraturum pacem rumpi, si subditi sui contra Romanos armati procedant.

Bell. Jud. ii. 16. § 4. p. 190.

XXXI. Quæri sæpe solet an et hoc locum habeat, si cujus subditi non per se arma moveant, sed aliis bellum gerentibus militent. Certe Cerites apud Livium se purgant, suos non publico consilio militasse. Eademque Rhodiensium fuit defensio. Et verius est, ut id quoque permittendum non sit, nisi probabilibus argumentis appareat actum aliud, ut nunc interdum fieri solet, exemplo veteri Ætolorum, quibus pro jure erat, [p] *ἄγειν λάφυρον ἀπὸ λαφύρου, ex omni præda prædam sumere:* cujus moris hanc vim esse ait [q] Polybius: *κἂν ἕτεροί τινες πολεμῶσι πρὸς ἀλλήλους, ὄντες Αἰτωλῶν φίλοι καὶ σύμμαχοι, μηδὲν ἧττον ἐξεῖναι τοῖς Αἰτωλοῖς ἄνευ κοινοῦ δόγματος καὶ παρ' ἀμφοτέροις πολεμοῦσι τὴν χώραν ἄγειν τῶν ἀμφοτέρων· etiamsi non ipsi sed alii bellum gerant amici ipsorum aut socii, ut eo non minus Ætolis liceat,* [r] *citra publicum decretum utrique parti militare et utrinque prædas agere.* Livius de iisdem: *juventutem adversus suos socios publica tantum auctoritate demta militare sinunt, et*

Lib. vii. 20.
Gell. vii. 3.
Polyb. xvii. 4, 5.
Lib. xxxii. 34.

p *Ἄγειν λάφυρον ἀπὸ λαφύρου*] Plautus *Truculento: de præda prædam capio.* (II. 7, 15, 16.)

q *Polybius*] Vide eum et in *Excerptis.* (num. 6.)

r *Citra publicum decretum*] Idem de

proceed in arms against the Romans [without being restrained by him.]

XXXI. It is often made a question, whether this holds, if the subjects of any sovereign do not take arms on their own account, but act in military service under others who are making war. Undoubtedly the Cerites in Livy excuse themselves, by saying that their citizens had joined the army by no public act: and the same defense was alleged by the Rhodians. And the better opinion is, that such service is not permitted, except it appear by probable arguments that some other line was agreed on; as we sometimes see in our days; [that persons of another country serve in armies which are carrying on war;] following the example of the old Etolians, who took service and gathered booty on both sides in any war, as Polybius and Livy say. In former times, the Etruscans, though they would not send aid to the Veientes, did not prevent any of their young men going as volunteers to the war.

XXXII. 1 Again, the peace must be supposed to be broken, if armed force be used, not only against the general body of the state,

contrariæ sæpe acies in utraque parte Ætolica auxilia habent. Olim Etrusci, negato Veientibus auxilio, si qui suæ juventutis voluntarii ad id bellum irent, non impediebant. Liv. v. 17.

XXXII. 1 Rursum pax rupta censeri debet, non modo si toti corpori civitatis, sed et si subditis vis armata inferatur, nimirum sine nova causa. Nam ut omnes subditi tuti sint, pax initur: est enim pax actus civitatis pro toto et pro partibus. Imo et si causa nova subsit, per pacem licebit se suaque defendere. Naturale enim hoc, ut ait Cassius, arma armis repellere: ideo abdicatum inter pares non est ut facile credatur: ulcisci autem aut ablata recuperare per vim non licebit, nisi postquam judicium erit negatum. Hæc enim res moram fert: illa non fert. *L. vim. vi,* 1. § 27. *D. de vi et vi arm.*

2 At [s] si quorum subditorum ita perpetuum sit maleficium ac juri naturæ contrarium, ut quod faciunt id credendi sint omnino facere rectoribus suis improbantibus, et in eos judicium postulari non possit, quales sunt qui piraticam exercent; ab his et res recuperare et ultionem exposcere licebit tanquam a deditis. At alios innocentes eo nomine armis impetere, id vero est contra pacem.

Hunnis Sabiris suo tempore narrat Agathias libro IV. (cap. 3.)

[s] *Si quorum subditorum ita perpetuum sit maleficium*] Ita Augustus judicavit contra Syllæum pro Herode. Josephus XVI. 10. § 8. *Ed. Hudson.*

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but against its subjects; that is, without new cause. For peace is concluded, that all the subjects may be in safety: peace is the act of the state for the whole and for the parts. And even if a new cause do arise, it will be lawful, notwithstanding the peace, for the persons attacked to defend themselves and their property. For it is natural, as Cassius says, to repel arms by arms: and therefore we are not readily to believe that this right is abdicated between equals. But in such case, to exercise vindictive acts, or to recover by force what has been taken away, will not be lawful, except after judgment has been denied. For satisfaction and recovery admit of delay, but self-defense does not.

2 But if there be any portion of the subjects, whose malpractices are so perpetual, and so contrary to the laws of nations, that what they do, they must by all means be supposed to do contrary to the approval of their rulers; and if they cannot be called before a proper tribunal, as for instance, Pirates; from them it is lawful to exact satisfaction, and to recover property, as from persons surrendered to us. But to attack other innocent persons on that ground, is a breaking of the peace.

XXXIII. 1 [t]Sociis quoque vis armorum illata pacem rumpit: sed his demum qui in pace comprehensi sunt, ut ostendimus cum Saguntinam controversiam examinavimus. Urgent hoc Corinthii in oratione, quæ est apud Xenophontem historiæ Græcæ sexto: πᾶσιν ὑμῖν πάντες ἡμεῖς ὠμόσαμεν, *omnes vos vobis omnibus juravimus.* Quod si ipsi socii non pepigerint, sed alii pro ipsis, idem tamen statuendum erit, postquam satis constat, eos socios pacem ratam habuisse: nam quamdiu adhuc incertum est an ratam habere velint, hostium loco sunt.

Lib. ii. 16. § 13.

Cap. 5. § 37.

2 Aliorum sociorum, ut et cognatorum et affinium, qui nec subditi sunt, nec in pace nominati, separata causa est, nec ad pacem ruptam vis in eos trahi potest: neque tamen sequitur, ut et supra diximus, bellum eo nomine suscipi non posse, sed id bellum erit ex nova causa.

Cep. cons. 690. Dec. cons. 531.

XXXIV. Rumpitur et pax, ut diximus, faciendo contra id quod in pace dictum est: sub faciendo autem comprehenditur et non facere quod et cum oportet.

XXXV. Neque admittam hic discrimen capitum pacis quæ majoris, quæque minoris momenti sint. Satis enim magna

[t] *Sociis quoque vis armorum illata pacem rumpit*] Thuanus Lib. LXV. anno cIↃ IↃ LXXVIII. Est et, quod huc pertineat, apud Haræum, tomo II. *Historiæ Brabanticæ* in anno cIↃ IↃ LVI.

[u] *Ut capitibus minoris momenti adjiciatur, ut si quid adversus ea factum erit, pacem non rumpat*] Vide egregium

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XXXIII. 1 Also armed force, exerted against allies, breaks the peace: but against those allies only who are comprehended in the peace, as we shewed in examining the Saguntine controversy. So the Corinthians urge, *We all have sworn to you all.* But if the allies themselves have not made the treaty, but others for them, the same rule must be laid down, as soon as it appears that those allies hold the peace to be good. For so long as this is uncertain, they are to be considered as enemies.

2 With regard to other allies, and other parties, in any way related to the principals, but who are neither subjects, nor nominated in the peace, the case is different; nor can force used towards them be regarded as an infraction of the peace. But still, it does not follow, as we have also said before, that war may not be undertaken on that ground; but that will be a war from a new cause.

XXXIV. The peace is broken, as we have said, by doing against that which is set down in the peace: but under *doing* we include, *not* doing what we ought, and when we ought.

XXXV. Nor can I admit the distinction of articles of peace, of greater, and of less importance. For everything which is put in the

ut serventur videri debent quæ pace comprehensa sunt. Bonitas tamen, maxime Christiana, leviores culpas, accedente præsertim pœnitentia, facilius condonabit, ut illud locum habeat, *Sen. Agam. v. 243.*

Quem pœnitet peccasse, pæne est innocens.

Sed quo magis paci caveatur, consultum erit [u]ut capitibus minoris momenti adjiciatur, ut si quid adversus ea factum erit, pacem non rumpat: aut ut arbitri prius adeantur quam arma inferre liceat, quod erat in federe Peloponnesiaco, memorante Thucydide. *Vid. supra ii. 15. § 15.* Lib. v. 79.

XXXVI. Et plane sentio id actum videri, [x]si qua specialis pœna adjecta sit: non quod nesciam posse ita contrahi, ut electio sit ejus, cui facta est injuria, pœnam malit, an a transactione recedere, sed quod negotii natura hoc, quod dixi, potius requirat. Illud quidem constat, et jam supra dictum a nobis est, et historiæ auctoritate probatum, pacem non rumpere qui pactis simpliciter factis posterior non stat: neque enim tenebatur nisi sub conditione. Lib. iii. 19. § 14.

XXXVII. Quod si necessitas aliqua in causa sit, quo minus pars una impleat id quod promissum est, puta si res perierit, aut ablata sit, aut factum redditum sit aliquo eventu impossibile, pax quidem rupta non censebitur: nam, ut dixi-

exemplum in pace Justiniani, Justinianum inter et Chosroën. Menander Protector eam habet. (Pag. 118. *Ed. Hœschel.*)

[x] *Si qua specialis pœna adjecta sit*] Ut in Gotthorum pactis cum Francis. Vide Procopium *Gotth.* I. (Cap. 12.)

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treaty is of importance enough to be kept. But yet goodness, and especially Christian goodness, will the more readily pardon the lighter faults, especially if there be penitence for them. But in order the better to provide for the permanence of the peace, it may be added to the less important articles, that if anything is done against them, the peace is not broken: so that arbitration is to be had recourse to, rather than arms; which was the case in the Peloponnesian league, as Thucydides relates.

XXXVI. And I conceive that this must be understood to be settled, if any special penalty be added: not that I am ignorant, that a contract may be made, on this condition, that it shall be at the election of him who receives injury, whether he will have the penalty, or will recede from the transaction; but that the nature of the business rather requires what I have stated. It is apparent, however, and has already been said by us, that he does not break the peace, who does not stand by covenants made simply [that is, without a penalty,] when the other party has set him the example. For he was only bound conditionally.

XXXVII. But if any necessity be the cause why one party has not

mus, non solet illa pendere a conditione casuali. Sed alter optabit, an expectare malit, si qua spes sit impleri promissum serius posse, an æstimationem accipere, an mutuis præstationibus isti capiti respondentibus aut æquum valentibus liberari.

Vid. supra hoc libro, c. 19. §§ 13, 14.

XXXVIII. Certe, etiam post læsam fidem, integrum est innocenti pacem servare, sicut Scipio fecit post multa Carthaginiensium perfida facta, quia contra obligationem faciendo nemo se obligationi eximit: et, si additum est, ut tali facto pax rupta habeatur, adjectum id censeri debet in commodum innocentis duntaxat, si eo uti velit.

XXXIX. Postremo diximus, pacem solvi faciendo id, quod specialis pacis natura repudiat.

L. Postlim. 5. D. de capt.

XL. 1 Sic quæ contra amicitiam sunt, rumpunt pacem, quæ sub amicitiæ lege contracta est: quod enim inter ceteros solius amicitiæ officium exigeret, hic etiam pacti jure præstandum est. Et huc, non vero ad quamvis omnino pacem (est enim et fedus, non amicitiæ causa, ut nos Pomponius docet) refero multa, quæ de injuriis non armatis et contumelia a

y *Subditos singulos, qui ex altera ditione in alteram migrare volunt, suscipere, non est contra amicitiam*] Solon: γενέσθαι πολίταις οὐ δίδωσι πλὴν τοῖς φεύγουσιν ἀειφυγίᾳ τὴν ἑαυτῶν, ἢ πανεστίοις Ἀθήναζε μετοικιζομένοις ἐπὶ τέχνῃ. *civium albo asscribi non sivit, nisi eos qui e sua patria in exilium per-*

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fulfilled what was promised; for instance, if the thing demanded have perished, or been taken away, or the act have become impossible by any event; the peace indeed shall not be broken; for, as we have said, it does not commonly depend on a casual condition. But the other party must have the option, whether he will rather wait, if there be any hope that the promise can be fulfilled at a later period; or receive the estimated value of his loss; or be liberated by mutual concessions corresponding to that article, or of the like value.

XXXVIII. Undoubtedly even after faith has been violated, it is open to the blameless party to observe the peace; as Scipio did, after many perfidious acts of the Carthaginians; because no one, by acting against his obligation, exempts himself from his obligation: and if it be added in the treaty, that in such a case the peace is to be understood to be broken, this is to be supposed added only for the benefit of the innocent party, if he choose to use the liberty given.

XXXIX. Lastly, we have said that the peace is broken, by doing that which the special nature of the peace repudiates.

XL. 1 Thus, acts which are against friendship, break a peace which was contracted under the law of friendship: for what, between others, the office of friendship only would require, is here also to be performed by the covenanted right. And to this case, but not to every peace whatever, (for there are leagues not for the sake of

legum peritis dissertari solent, et præcipue illud Tullii: *post reditum in gratiam si quid est commissum, id non neglectum sed violatum putatur, nec imprudentiæ sed perfidiæ assignatur.* Sed hic quoque detrahenda quantum fieri potest facto invidia. *Pro Gabin. Apud Hier. Apol. adv. Rufin.*

2 Itaque personæ quamvis conjunctæ aut subditæ facta injuria, ipsi quicum pax inita est facta non censebitur, nisi aperte ad ipsius sugillationem facta sit, quam naturalem æquitatem in servis atrociter læsis sequuntur leges Romanæ: et adulterium aut stuprum libidini potius quam inimicitiæ imputabitur: et invasio rei alienæ novæ potius cupiditatis reum faciet, quam fidei læsæ. *L. item* 15. *§ si quis* 35. *D. de injur. Instit. § serv.* 3. *eod. tit. Alex.* ii. *Cons.* n. 3.

3 Atroces sane minæ, nulla nova causa præcedente, cum amicitia pugnant: et huc referam arces in finibus structas, non tuendi sed nocendi causa, et insolitam copiarum conscriptionem, si justis satis indiciis appareat, in non alium hæc, quam in eum quicum pax facta est, comparari.

XLI. 1 [y]Subditos singulos, qui ex altera ditione in

petuum ejecti essent, aut cum omni familia artificii alicujus exercendi causa Athenas migrassent. [PLUTARCH. *Vit. Sol.* pag. 91 E.] Perseus apud Appianum in *Excerptis Legationum* num. 25. κοινῷ γε πάντων ἀνθρώπων νόμῳ, καθὰ καὶ ὑμεῖς τῶν ἑτέρων φεύγοντας ὑποδέχεσθε· *feci hoc communi hominum*

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friendship, as Pomponius teaches us,) I refer many discussions which occur in lawyers, about injuries not by arms, and insults, and the like; and especially that of Cicero: *After the return into goodwill, if any wrong is committed, that must be considered, not as a neglect but as a violation, and assigned not to oversight but to perfidy.* But here also we must divest the fact of an odious character as much as possible.

2 And hence an injury done to a person connected with or subject to another, shall not be supposed to be done to him with whom the peace was made, except it be openly done to insult him. And this rule of natural equity is followed by the Roman laws, in weighty injuries done to another person's servants: so that adultery or violation shall be imputed rather to lust than to enmity: and the seizure of another person's goods rather constitutes an act of new cupidity, than of broken faith.

3 Atrocious threats, without any new cause preceding, are at variance with friendship: and to this head I refer fortresses built on the border of a territory, for the sake, not of defense but of offense; and unusual raising of troops, if it appear, by sufficient indications, that these are intended against the person with whom peace was made.

XLI. 1 It is not against friendship to receive individual subjects, who wish to migrate from the authority of one party to that of the

alteram migrare volunt, suscipere non est contra amicitiam. Neque enim naturalis tantum, sed et favorabilis est ista liber-
Lib. ii. 5. § 24. tas, ut alibi diximus. Eodem loco pono perfugium exulibus
Ibid. § 25. datum. Nam in exules, ut ex Euripide diximus alibi, nullum
Lib. xlii. 41. jus civitati. Perseus apud Livium recte, *quid attinet cuiquam exilium patere, si nusquam exuli futurus est locus?*
Immo Orat. Leuctr. i. p. 105 c. Tom. II. Aristides Leuctrica secunda: δέξασθαι τοὺς ἐκπεσόντας, vocat κοινὸν ἅπασιν ἀνθρώποις· *commune jus hominum exules recipere.*

2 Plane [z] oppida aut magnos cœtus, qui civitatis partem integrantem faciant, recipere non licet, ut alibi diximus: neque magis eos qui ex sacramento, aut aliter, ministerium aut servitutem debent. De his autem, qui belli sorte servi sunt, idem introductum gentium jure apud quosdam populos supra
Lib. iii. 7. § 8. memoravimus. Sed et de his, qui exules non acti pœnam
Lib. ii. 21. § 3. *et seq.* justam effugiunt, dedendis egimus alibi.

XLII. Sortis aleæ subjici belli exitus licite non semper potest, sed tum demum, quoties de re agitur in quam plenum

jure, quomodo et vos alibi ejectos suscipitis. (Pag. 367. *Ed. Fulv. Ursin.*) Commune hoc jus pactis firmari aut adstringi solet. Vide pacem Antiochi apud Polybium *Exc. Leg.* n. 35. et apud Livium. (Lib. xxxviii. c. 38.) pacem inter Romanos et Persas apud Menandrum Protectorem. (Pag. 117, 118. *Ed. Hœschel.*) Simlerum de Helvetiorum inter se pactis. *Aradii, regibus Syriæ inter se certantibus, obtinuere, ut fugientes suscipere possent, sed non emittere.* Testatur id Strabo xvi. (Pag. 754. *Ed. Casaub. Paris.*)

z *Oppida aut magnos cœtus, qui civitatis partem integrantem faciant, recipere non licet, ut alibi diximus*] Libro ii. cap. v. § 24. Vide et Bizarum

other. For such liberty is not only natural, but advantageous also, as we have elsewhere said (B. ii. Ch. v. § 24. No. 3). Under the same head, I place refuge granted to exiles. For, as we have before said, the state has no right over exiles. So Perseus in Livy; and Aristides says, *It is the common right of men to receive exiles.*

2 Towns, or large bodies of men, which make an integral part of a state, it is not lawful to receive, as we have elsewhere said: nor those who, under an oath or otherwise, owe ministerial offices or obedience. With regard to those who are slaves by the fortune of war, the same rule has been introduced by the Law of Nations, among some peoples, as we have said. Concerning the extradition of those who, not being exiled, fly from just punishment, we have spoken elsewhere.

XLII. The practice of submitting the event of the war to the result of Lot, cannot always be lawfully adopted; but then only, when the matter in question is one over which we have plenary dominion. For the state is bound to defend the life, chastity, and like possessions

habemus dominium. Nam ad subditorum vitam, pudicitiam, et similia tuenda, civitas, et ad bonum civitatis tuendum rex arctius obligatur, quam ut omittere possit eas rationes, quæ ad sui et aliorum tutelam maxime sunt naturales. Attamen si vera æstimatione qui injusto bello impetitur tanto sit inferior, ut resistendi nulla spes sit, videtur sortem offerre posse, ut certum periculum incerto evadat: hoc enim est de malis minimum.

XLIII. 1 Sequitur valde agitata quæstio de præliis, quæ definito numero condicuntur belli finiendi causa, puta inter singulos utrimque, ut Æneam et Turnum, Menelaum et Paridem: inter binos utrimque[2], ut inter Ætolos et Eleos: Pausan. v. inter ternos utrimque, ut inter Horatios Romanos et Curiatios T. Liv. i. 24, *et seqq.* Albanos: inter tricenos utrimque, ut inter Lacedæmonios et Argivos.

2 Si jus gentium externum tantum spectamus, non est dubitandum, quin per id ipsum talia certamina sint licita: hostium enim cædem id jus indiscrete permittit. Quod si vera

libro XII.

[2] De singulis tantum loquitur PAUSANIAS, quem in ora libri Auctor noster testem indicat (neque enim alio referri potest illius testimonium) nimirum Degmenus Eleus, ab una parte; Pyræchma Ætolus, ab altera, electi sunt, qui singulari certamine de re inter utrumque Populum controversa decernerent. Neque in memoriam revocavit Auctor, se idem exemplum, tamquam e Strabone, alibi adtulisse, Lib. II. cap. 23. § 10. num. 1. Epeus enim, et Eleus, ibi unum idemque sunt. Ceterum locus Pausaniæ, de quo jam agitur, exstat cap. 4. dicti Lib. v. *J. B.*

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of its subjects, and the sovereign, to defend the good of the state, by ties too close, to allow him to pass by those reasons which are most natural, for the defense of himself and others. But if, in a reasonable estimation, he who is attacked in an unjust war is so far inferior that there be no hope of resisting, it seems that the chance of Lot may be offered, that he may avoid a certain danger by an uncertain one: for this is the less of the evils.

XLIII. 1 Then follows a much agitated question, concerning Combats agreed upon to take place between a definite number, for the sake of ending the war; for example, between one on each side, as Eneas and Turnus, Menelaus and Paris; between two on each side, as between the Etolians and the Eleans; [a mistake, J. B.] between three on each side, as the Horatii for Rome, and the Curiatii for Alba; between three hundred on each side, as between the Lacedæmonians and Argives.

2 If we only look at the external Law of Nations, it is not to be doubted that by it, of itself, such combats are lawful; for that law permits the killing of all the enemy without distinction. And if the

esset veterum Græcorum, Romanorum, et aliarum gentium opinio, quemque vitæ suæ esse summo jure dominum, jam et interna justitia talibus præliis non deesset. Sed hanc sententiam rectæ rationi ac Dei præceptis pugnare aliquoties jam diximus. In proximi caritatem peccare eum, qui ob res, quibus carere possumus, retinendas, hominem occidit, alibi ostendimus et ratione, et sacrorum oraculorum auctoritate.

Lib. ii. 19. § 5, et xxi. § 11. Lib. ii. 1. § 12, *et seqq.*

3 Addemus nunc, et in se et in Deum peccare, qui vitam sibi a Deo pro magno beneficio concessam tam vili æstimat. Si res bello digna agitur, ut multorum innocentium salus, pro ea totis viribus nitendum est. Condicto certamine uti, tanquam testimonio bonæ causæ aut judicii divini instrumento, vanum est et a vera pietate alienum.

Thom. 2, 2. q. 95. art. 8. *et ibi* Cajet.

4 Una res est[3], quæ tale certamen justum ac pium potest reddere ex una duntaxat parte, si alioqui omnino expectandum sit ut qui injustam causam fovet victor sit futurus

Cajet. *d. l.*

[3] Confer heic PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. VIII. c. viii. § 5. *J. B.*

[a] *Quomodo Assyrium regem Cyrus provocavit*] [Apud XENOPHONTEM, *De Cyri Instit.* Lib. v. c. 3. n. 4.] Et multo ante Hyllus Eurystheum. Vide Euripidem *Heraclidis.* [vers. 804, *et seqq.* At aliter rem narrat DIODORUS SICULUS, *Bibl. Histor.* Lib. IV. c. 59, 60. *J. B.*]

[b] *Ut ipsi principes populorum armis rem inter se disceptarent*] Hoc Adrianopolitæ respondebant Mahumeti de ipso et Musa Zelebe. Leunclavius Lib. XI. Sic Cunibertus Langobardorum rex Alachin provocat. Paulus Warnafredi Lib. v. (cap. 40.) Sic de Chersonis castro Pharnacus cum Sauromato pugnare volebat, ne multitudo ob ipsorum contro-

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opinion of the old Greeks, Romans, and other nations were true, that each person is supreme master of his own life, then also internal justice would not be wanting in such combats. But we have already said, more than once, that this opinion is at variance with right reason and the precepts of God. That he sins against the love of his neighbour, who kills a man in order to keep things which he can afford to go without, we have elsewhere shewn, both by reason and by the authority of the sacred writings.

3 We have now to add, that he sins against himself and against God, who holds cheap the life that was given him by God as a great boon. If a matter worthy of a war be at stake, as the safety of many innocent persons, for it we must contend with all our powers. To have recourse to a set combat, as a testimony of a good cause, or an instrument of divine justice, is a vain fancy, and foreign to true piety.

4 There is one circumstance, which may render such a combat just and pious on one side only; if otherwise it is to be confidently expected

cum magna innocentium strage: nihil enim ei imputandum est, qui mavult ea ratione certare, quæ spem ipsi maxime probabilem ostentat. Sed et hoc verum est, quædam quæ non recte fiunt, ab aliis tamen recte non probari, sed permitti, ut graviora mala, quæ aliter vitari non possunt, vitentur: quomodo multis in locis tolerantur et improba fenora, et impudicitiam professæ mulieres.

5 Quod ergo supra diximus cum de præveniendo bello Lib. ii. 23. § 10.
ageretur, si duo, quos inter de regno controversia est, parati Ægid. Reg. *disp.* 32. *dub.*
sint inter se armis cernere, pati id posse populum, ut major 2. n. 18.
calamitas ceteroqui imminens evitetur: idem et, cum de bello finiendo agitur, dicendum erit. [a]Quomodo Assyrium regem
Cyrus provocavit: et apud Dionysium Halicarnassensem Me- Lib. iii. 12.
tius ait, non iniquum fuisse, [b]ut ipsi principes populorum armis rem inter se disceptarent, si de ipsorum, non de populorum potentia aut dignitate controversia fuisset. Sic [c]Heraclium

versiam periculis objiceretur; narrat Constantinus Porphyrogenneta capite de castro Chersonis. Vide exemplum singularis certaminis de regno apud Pontanum *Historia Danica:* et quæ de provocationibus inter Carolum V. Imperatorem et Franciscum Primum Galliæ regem, narrant historici. [Certamen singulare, de quo Pontanus, fuit inter Edmundum et Canutum. Vide Lib. v. pag. 151. *Ed. Amst.* 1631. Illius autem inter Pharnacum et Sauromatum, nullum est vestigium in cap. *De Castro Chersonis,* quod est ultimum Lib. II. *Const. Porphyrogennetæ de Thematibus;* neque alibi in toto opere. *J. B.*]

[c] *Heraclium*] Vide Aymoinum libro IV. cap. 21. et Fredegarium cap. 64.

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that he who maintains an unjust cause, will be victorious with a great slaughter of innocent persons. For there is then no blame imputable to him who, in such a case, prefers the combat which gives him the best hope which is to be had. But this also is true, that some things which may be done without blame, cannot without blame be approved by others; though they may be permitted that graver evils, which cannot otherwise be avoided, may be avoided: as in many cases, usury and prostitution are tolerated.

5 Therefore what we have said above, when we spoke of preventing war; that if two persons between whom lies the dispute concerning a kingdom, are ready to fight it out in a combat, the people may allow it to be so decided, that the greater calamity which otherwise impends may be avoided; may be said here also, when the question is about terminating the war. In this way, Cyrus challenged the Assyrian king: and in Dionysius, Metius says that it would not have been unjust, that the leaders of the two peoples should themselves decide the matter by a combat, if the controversy were concerning their own

Imperatorem cum Cosroë filio Persarum regis pugnasse singulari certamine legimus.

XLIV. Ceterum qui sic in prælii exitum conjiciunt controversiam, sibi quidem jus, si quod habent, adimere possunt, non et alteri, qui non habet, dare, in illis quidem regnis quæ in patrimonio non sunt. Itaque, ut valeat pactio, et populi et si qui jam nati jus ad successionem habent consensum necesse est accedere: in feudis non liberis, etiam domini sive senioris.

XLV. 1 Sæpe in talibus præliis quæri solet, [d] uter pro victore sit habendus. Victi non possunt videri nisi qui aut omnes occubuerunt, aut in fugam dati sunt. Sic [e] in fines se
Lib. iii. 2, 3. aut oppida recipere apud Livium victi signa.

2 Apud tres nobiles historicos, Herodotum, Thucydidem, Polybium, tres proponuntur de victoria controversiæ, quarum prima ad condictum certamen pertinet. Sed, si quis recte advertat, inveniet omnibus illis præliis sine vera victoria dis-

[d] *Uter pro victore sit habendus*] Ennius [Apud Servium, in fragm.]:

Qui vicit non est victor nisi victus fatetur.

Vide Scaligerum ad illud Festi, *herbam do.*

[e] *In fines se aut oppida recipere apud Livium victi signa*] Et apud Guicciardinum, Lib. II.

[f] *Cadavera ad sepulturam concedere*] Plutarchus *Agesilao:* *ὡς δ' ἔπεμψαν οἱ πολέμιοι νεκρῶν ἀναίρεσιν αἰτοῦντες, ἐσπείσατο, καὶ τὴν νίκην οὕτως ἐκβεβαιωσάμενος, εἰς Δελφοὺς ἀπεκομίσθη· postquam autem hostes misere ut mor-*

power or dignity, and not that of the peoples. So we read that Heraclius the emperor fought Cosroes, the son of the king of the Persians, in a single combat.

XLIV. But they who thus set the issue of the dispute on the result of a combat, may indeed forfeit their own right, if they have any, but they cannot so give to another what they themselves have not, in those kingdoms which are not patrimonial. Therefore that such a covenant may be valid, it is necessary that there should be obtained also the consent, both of the people, and of those who are in existence, who have a right to the succession: and, in fiefs which are not free, the consent also of the lord or seigneur of the fief.

XLV. 1 In such combats, it is often a question which party is to be esteemed the conqueror. A party can be reckoned vanquished, only when either all its combatants have fallen, or have been put to flight. In Livy it is a mark of being conquered, when the party are driven into their own boundaries or towns.

2 In the three great historians, Herodotus, Thucydides, and Polybius, there are three controversies concerning victory; of which the first refers to a set combat. But if any one examines well, he will find

cessum. Nam Argivi non fugati ab Othryade, sed nocte superveniente abierant, victores se rati et id suis renuntiaturi. Neque Corinthios fugaverant Corcyræi, sed Corinthii, cum feliciter pugnassent, Atheniensium classem validam conspicati, nullo cum Atheniensibus virium periculo facto, cessim ierant. Philippus vero Macedo Attali quidem navem a suis desertam ceperat, at classem nihil minus quam fugaverat. Itaque, ut Polybius notat, magis pro victore se gerebat, quam victorem se sentiebat.

Herod. i. 82.

Thucyd. i. 51, 54.

Lib. xvi. 1. pp. 1014, 1015.

3 Illa vero, spolia legere, [f]cadavera ad sepulturam concedere, prælio iterum lacessere, quæ et dictis locis et apud Livium aliquoties reperias ut signa poni victoriæ, per se nihil probant, nisi quatenus cum aliis indiciis valent ad docendam hostium fugam. Et certe, qui loco cessit, in dubio magis est ut fugisse credatur. At, ubi victoriæ firma argumenta non sunt, res manet eo loco quo ante prælium fuit: et aut ad bellum, aut ad novas pactiones veniendum est.

Lib. xxix. xl.

tuos tollere liceret, concessit, eoque modo victoriæ testimonium adeptus Delphos abiit. (Pag. 606 B.) Idem *Nicia: καί τοι κατὰ νόμον τινὰ καὶ συνήθειαν οἱ νεκρῶν ὑπὸ σπονδῶν λαβόντες ἀναίρεσιν, ἀπολέγεσθαι τὴν νίκην, καὶ τρόπαιον ἱστάναι τοὺς τούτων τυχόντας οὐκ ἔνθεσμον ἦν· quanquam more et instituto recepto qui mortuos deportandos concessu acceperant, censebantur a se abdicasse victoriam, et qui id impetrassent, eis jus non erat trophæa figendi.* (Pag. 527 A. B.)

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that in all the three, the parties separated without a real victory. The Argives, in Herodotus, were not put to flight by Othryades, but went away on night coming on, thinking themselves victorious, and carried that news to their friends. Nor did the Corcyreans in Thucydides put to flight the Corinthians; but the Corinthians, when they had carried on the combat successfully, seeing the fleet of the Athenians approach in force, retreated without trying their strength with it. In Polybius, Philip of Macedon took indeed the ship of Attalus when it had been deserted by its crew, but was very far from having put to flight his fleet; and therefore, as Polybius says, he rather bore himself as victor, than thought himself victorious.

3 Those proceedings, of collecting the spoils, granting the bodies of the dead for sepulture, provoking the adversary to renew the battle, which, in the places just quoted, and in Livy, you sometimes find put forwards as signs of victory, of themselves prove nothing; except so far as they go along with other indications to prove the flight of the enemy. Certainly he who has left the field may, in a case of doubt, be supposed to have run away. But when there is no clear proof of victory, the matter remains in the condition in which it was before

L. societ. 76. D. pro socio.

XLVI. 1 Arbitriorum Proculus nos docet duo esse genera: unum ejusmodi, ut sive æquum, sive iniquum, parere debeamus, quod observatur, ait, cum ex compromisso ad arbitrum itum est: alterum ejusmodi, ut ad boni viri arbitrium redigi debeat, cujus generis exemplum habemus in Celsi responso: *si libertus*, inquit, *ita juraverit dare se quot operas patronus arbitratus sit, non aliter ratum fore arbitrium patroni quam si æquum arbitratus sit.* Sed hæc jurisjurandi interpretatio, ut Romanis legibus induci potuit, ita verborum simplicitati per se spectatæ non convenit. Illud tamen verum manet, utrovis modo arbitrum sumi posse, aut ut conciliatorem tantum, quales Athenienses inter Rhodios et[4] Demetrium fuisse legimus, aut ut cujus dicto parendum omnino sit[5]. Et hoc est genus de quo nos hic agimus, et de quo nonnulla supra diximus cum de cavendi belli rationibus loquemur.

L. si libertus. 30. D. de op. lib.

Lib. ii. 23. § 8.

2 Quanquam vero etiam de talibus arbitris, in quos compromissum est, lex civilis statuere possit, et alicubi statuerit,

[4] Habet hoc e PLUTARCHO, *Vit. Demetr.* pag. 899 A. Nihil enim de hoc officio Atheniensium memorat Diodorus Siculus, Lib. XX. cap. 100. quum tamen fuse narret frustraneam Rhodi obsidionem, quæ ad pacem ineundam Demetrium compulit. *J. B.*

[5] Confer heic PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. V. cap. xiii. § 4. *et seqq.* *J. B.*

[g] *Id tamen inter reges et populos locum habere non potest*] Mariana libro XXIX. 15. Bembus libro IV. (fol. 62.) Paces per arbitrum f. ctas habes aliquam multas in Polonica historia Cromeri libris X. XVI. XVIII. XXI. XXIV. XXVII. XXVIII. Habes et in Danica Pontani libro II. confer quæ nos supra

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the battle; and recourse must be had either to war, or to new agreements.

XLVI. 1 Of Arbitrations there are two kinds, as Proculus teaches us: one, in which, whether the decision is just or unjust, we must submit to it; which is the rule, he says, when we come to arbitration by a compromise; another, in which the matter is reduced to the decision of a fair man. Of this we have an example in the response of Celsus. *If a freedman*, he says, *has sworn to give as many days' work as his master shall judge right, the master's decision is not valid except he judge fairly.* But this mode of interpreting an oath, though it may be introduced by the Roman laws, is not in agreement with the simple meaning of the words. Still it is true that an arbitrator may be taken in two different ways, either as a mediator only, as we read that the Athenians were between the Rhodians and Demetrius; or as one whose decision is to be absolutely obeyed. And this latter is the kind of which we here speak, and of which we have already said somewhat,

ut ab iis provocare et de injuria queri liceat; [g]id tamen inter reges ac populos locum habere non potest. Nulla enim hic est potestas superior, quæ promissi vinculum aut impediat, aut solvat. Standum ergo omnino, sive æquum, sive iniquum pronuntiaverint, ita ut Plinii illud huc recte aptes: *summum quisque causæ suæ judicem facit, quemcunque eligit.* Aliud enim est de arbitri officio, aliud de compromittentium obligatione quærere. *Præf. Nat. Hist.* p. 3.

XLVII. 1 In arbitri officio spectandum, an electus sit in vicem judicis, an cum laxiore quadam potestate, quam [6]arbitri quasi propriam vult Seneca, cum dicit: *melior videtur conditio causæ bonæ, si ad judicem, quam si ad arbitrum mittitur: quia illum formula includit, et certos, quos non excedat, terminos ponit; hujus libera et nullis adstricta vinculis religio et detrahere aliquid potest et adjicere, et sententiam suam, non prout lex aut justitia suadet, sed prout humanitas et misericordia impulit, regere.* Lib. iii. *de benef.* c. 7. Aristoteles quoque ἐπιεικοῦς, id est, æqui et commodi hominis esse ait, εἰς δίαιταν μᾶλλον ἢ εἰς δίκην βούλεσθαι ἰέναι, *malle* *Rhet.* i. 13. *in fin.*

libro II. c. xxiii. § 8.

[6] In loco SENECÆ non agitur de *Arbitris ex compromisso:* sed illi Arbitri veri sunt Judices, nimirum Pedanei, seu a Prætore dati; Arbitri autem dicuntur, quod dentur in *Judiciis bonæ fidei,* ubi laxior erat eorum potestas, adeo ut ex æquo et bono decernere eis liceret; quum Judices stricte sic dicti, qui in *Judiciis stricti juris* addicebantur, intra verba et legum subtilitatem manere deberent. Vide CICER. *Orat. pro Rosc. Comœd.* c. 4. INSTIT. *de Actionib.* § 1 et 30. inprimis Eruditissimi NOODTII eximium Opus *de Jurisd. et Imp.* Lib. I. cap. 13. *J. B.*

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when we spoke of the means of obviating war.

2 For although, with regard to arbiters who are referred to by compromise, the Civil Law may direct, and does in some places direct, that it shall be lawful to appeal from them, and to complain of their wrong; this cannot have place between kings and peoples. For in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision, whether it be just or unjust; so that, as Pliny says, *When you choose a person your umpire, you make him your supreme judge.* For the discussion of the office of an arbiter is one thing, and that of the duty of persons who make a compromise is another.

XLVII. 1 In considering the office of an arbiter, we must consider whether he be elected into the place of a judge, or with some laxer power, which Seneca speaks of as the proper power of an arbiter: *The judge is limited by rules of law: the umpire is left quite free, and can soften law and justice by kindness and mercy.* So Aristotle says,

ire ad arbitrum quam in jus, rationem adjiciens, ὁ γὰρ διαιτητὴς τὸ ἐπιεικὲς ὁρᾷ. ὁ δὲ δικαστὴς τὸν νόμον· καὶ τούτου ἕνεκα διαιτητὴς εὑρέθη ὅπως τὸ ἐπιεικὲς ἰσχύῃ· *nam arbiter id quod æquum est respicit, judex legem: imo arbiter ejus rei causa repertus est, ut valeret æquitas.*

2 Quo in loco æquitas non proprie significat, ut alibi, partem illam justitiæ, quæ legis sonum generalem ex mente auctoris adductius interpretatur, (nam hæc et judici commissa est) sed omne id, quod rectius fit quam non fit, etiam extra justitiæ proprie dictæ regulas. Sed tales arbitri sicut inter privatos et ejusdem imperii cives frequentes sunt, et specialiter Christianis commendantur ab Apostolo Paulo I. Cor. VI. ita in dubio non debet tanta potestas concessa intelligi: in dubiis enim, quod minimum est, sequimur: præcipue vero id locum habet inter summam potestatem obtinentes, qui cum judicem communem non habeant, arbitrum censendi sunt adstrinxisse iis regulis, quibus judicis officium adstringi solet.

XLVIII. Illud tamen observandum est, arbitros lectos a populis aut summis potestatibus [h]de principali negotio pronuntiare debere, non de possessione: nam possessoria judicia juris civilis sunt: jure gentium possidendi jus dominium sequitur. Ideo, dum causa cognoscitur, nihil est innovandum, tum ne præjudicium fiat, tum quia difficilis est recuperatio. Livius

[h] *De principali negotio pronuntiare debere, non de possessione*] Id dux Sabaudiæ dicebat in controversia Saluciæ. Vide Serranum Henrico IV. [aut potius eum, qui Serrani Historiam ulterius deduxit.]

That a fair man will rather go to an arbiter than to a judge, because the arbiter looks to equity, the judge to law.

2 In this place, *equity* does not mean, as elsewhere, that part of justice which interprets the law by its general tendency and real purpose, (for this part also is committed to the judge;) but it means everything which is better done than not done, even extraneous to the rules of justice, properly so called. Such arbiters are frequent, in cases between private persons and citizens of the same empire; and are especially commended to Christians by St Paul, 1 Cor. vi.; but in a doubtful case, we are not to suppose that so much power is assigned to them. For in doubtful cases, we assume as little as may be. And this especially holds, between parties who have supreme authority; for these, since they have no common judge, are to be supposed to have bound the arbiter by the rules by which the office of a judge is commonly bound.

XLVIII. This however is to be remarked, that arbiters chosen

in historia disceptatorum inter populum Carthaginiensem et Masinissam, *legati*, inquit, *jus possessionis non mutarunt*. Lib. xl. 17.

XLIX. 1 Alterius generis est arbitri sumtio, cum quis ipsi hosti de se arbitrium permittit, quæ est deditio pura, subditum faciens eum, qui se dedit, ei vero, cui fit deditio, summam deferens potestatem: ἐπιτρέπειν τὰ καθ' αὑτὸν dicunt Græci. Sic Ætolos in senatu rogatos legimus, permitterentne de se arbitrium populo Romano. Consilium P. Cornelii Lentuli apud Appianum, circa finem belli Punici secundi, de re Carthaginiensium hoc erat: *permittant*, inquit, *Carthaginienses se arbitrio nostro, ut victi solent, et multi antehac fecerunt: videbimus deinde nos, et, si quid fuerimus largiti, habebunt nobis gratiam: neque enim fedus dicere poterunt: permultum autem interest. Quamdiu federa cum illis inimus, ut ea rumpant, semper aliquid causabuntur tanquam læsi adversus aliquam federis partem. Nam quia multa sunt dubiæ interpretationis, patet semper perplexandi materia. At, ubi ut deditis abstulerimus arma, corpora ipsa acceperimus in potestatem, tum demum intelligent nihil se habere proprium, demittent animos, et quodcumque a nobis acceperint, id tanquam de alieno datum libentibus animis accipient.* Liv. xxxvii. 49. Bell. Pun. p. 34.

2 Sed hic quoque distinguendum est, quid victus pati

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by peoples or sovereigns ought to decide concerning the principal point, [right of ownership, for instance,] not about possessions: for judgments concerning possessions belong to the Civil Law. By the Law of Nations, the right of possession follows the right of ownership. Therefore while the case is undergoing investigation, no innovation is to be made [in the possession], both to avoid prejudice, and because recovery of things so taken is difficult. So Livy says, between the Carthaginians and Masinissa, *the commissioners did not change the right of possession.*

XLIX. 1 The reference to an arbiter is of another kind, when a person gives himself up to the enemy as his arbiter. This is a pure surrender, making him who so gives himself up a subject, and giving supreme power to him to whom the surrender is made. So the Etolians were asked, in the senate, whether they gave themselves to the Roman people as arbiters concerning them. And P. Cornelius Lentulus, about the end of the second Carthaginian war, demanded that the Carthaginians should give themselves up entirely to the Romans, not as by treaty, but as by pure surrender.

2 But here also we must make a distinction, as to what the van-

debeat, et quid victor jure, quid etiam salvo omni officio facere possit, quid denique eum maxime deceat. Victus post deditionem nihil non patiendum habet: quippe jam subditus, et, si jus belli externum respicimus, eo in loco, ut ei nihil non eripi possit, etiam vita, etiam libertas personalis, multo magis bona, non publica tantum, sed et singulorum. *Ætoli*, inquit
Lib. xxxvii. 7. alio loco Livius, *permisso libero arbitrio, ne in corpora sæ-*
Lib. iii. 8. § 4. *viretur, metuebant.* Citavimus alibi: *ubi omnia ei, qui armis plus potest, dedita sunt, quæ ex iis habere victor, quibus mulctari eos velit, ipsius judicium atque arbitrium*
Lib. vii. *est.* Eodem[7] illud Livii pertinet: *Romanis mos vetustus erat, cum quo nec fœdere, nec æquis legibus jungerentur amicitia, non prius imperio in eum tanquam pacatum uti, quam omnia divina humanaque dedisset, obsides accepti, arma ademta, præsidia urbibus imposita forent.* Etiam occidi
Lib. iii. 11. § 16. licite interdum deditos ostendimus.

L. 1 At victor, ne quid injuste faciat, spectare primum debet, ne quem occidat, nisi id suo facinore meritum: sic et, ne cui quicquam auferat, nisi in justam pœnam. [i]Intra hunc autem modum, quantum securitas patitur, ad clementiam et liberalitatem propendere semper honestum est, interdum pro circumstantiis etiam ex morum regula necessarium.

[7] Locus non exstat Lib. vii. quem Auctor in margine indicat, sed Lib. xxviii. c. 34. quem errorem tacitus emendassem, ut innumeros alios ejusmodi silentio præterii, nisi fontem ejus ostendere possem, et aliquatenus id juvaret. Nimirum locum illum noster exscripserat e Petri Fabri Semestr. Lib. i. c. vii. p. m. 43. ubi tamquam ex Lib. vii. laudatur: et alterius libri ejus-

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quished party ought to suffer; what the victorious party may do by right; what other duties require of him; and finally, what becomes him. The vanquished, after surrender, is liable to suffer everything: he is already a subject; and if we look at the extreme right of war, is in such a condition that everything may be taken from him; even his life; even his personal liberty; much more, goods not only public, but even private property. So in Livy, *the Etolians, having surrendered at discretion, (permisso libero arbitrio,) were afraid that even their persons would not be spared.* We have elsewhere cited expressions, to the effect that the conqueror may take all: to the same effect is the passage of Livy, where he says that, of old, the Romans were not satisfied with anything short of a complete surrender on the part of their enemies. And we have shewn that those who have surrendered may sometimes lawfully be put to death.

L. 1 But the victor, in order not to do anything unjustly, ought

2 Diximus alibi, bellorum egregios fines, quoties ignoscendo transigitur. Nicolaus Syracusanus apud Diodorum: παρέδωκαν ἑαυτοὺς μετὰ τῶν ὅπλων πιστεύσαντες τῇ τῶν κρατούντων εὐγνωμοσύνῃ. διόπερ οὐκ ἄξιον αὐτοὺς τῆς ἡμετέρας ψευσθῆναι φιλανθρωπίας· *tradiderunt se cum armis, confisi clementiæ victoris: quare indignum foret eos decipi spe nostræ humanitatis.* Postea: τίς Ἑλλήνων τοὺς παραδόντας αὐτοὺς καὶ τῇ τῶν κρατούντων εὐγνωμοσύνῃ πιστεύσαντας ἀπαραιτήτου τιμωρίας ἠξίωσεν; *quis unquam Græcorum eos, qui se clementiæ victoris permitterent, indeprecabili supplicio puniendos censuit?* et Cæsar Octavius apud Appianum, L. Antonium, qui se deditum venerat, alloquens, σπονδὰς γάρ μοι τιθέμενος ἔτυχες ἂν ἠδικημένου καὶ νενικηκότος. ἄσπονδον δὲ σαυτόν τε καὶ τοὺς φίλους ἐπιτρέπων ἡμῖν καὶ τὸν στρατὸν, ἀφαιρῇ μὲν πᾶσαν ὀργὴν, ἀφαιρῇ δὲ καὶ τὴν ἐξουσίαν ἣν σπενδόμενος ἂν ἔδωκας (male editur ἔδωκα) ὑπ' ἀνάγκης. συμπέπλεκται γὰρ οἷς ἄξιον ὑμᾶς παθεῖν, τὸ προσῆκον ὧν ἐμὲ δίκαιόν ἐστι ποιεῖν· ὃ δὴ προτιμήσω· *si ad federa paciscenda venisses, sensisses me et victorem et injuria affectum: nunc, cum te amicos et exercitum arbitrio nostro permittis, demis mihi iram, demis et eam potestatem, quam in federe coactus esses concedere. Nam*

Lib. iii. 15. *in fin.*
Lib. xiii. 21.
Cap. 23.
Bell. Civ. v. p. 697.

dem Scriptoris numerus falso notatur. *J. B.*

[i] *Intra hunc autem modum, quantum securitas patitur, ad clementiam et liberalitatem propendere semper honestum est*] Vide nobile exemplum Ferdinandi Legionensium regis apud Marianam Lib. xi. c. 15. Et repete quæ nos supra hoc libro, cap. xi. § 14 et 15.

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first to consider that he is not to put any one to death except such a fate be deserved by his own act. And within this limit, as far as our own safety permits, it is always praiseworthy to incline to clemency and liberality; and sometimes, from circumstances and rules of manners, even necessary to do so.

2 We have elsewhere said, that a war is well ended, when it is finished by a pardon. So Nicolaus of Syracuse says, *They have surrendered, relying upon our clemency, wherefore it would be a shame that they should be mistaken.* And afterwards, *Who ever of the Greeks put to death those who gave themselves up to the clemency of the victor?* And Cesar says to L. Antonius, *If you had come to treat, you would have found me a victor who has received wrongs; but since you give yourself up entirely, you take away my anger and my power. I must consider, not only what you have deserved, but what is fit for me to do, and must prefer the latter.*

cum eo, quod vos dignum est pati, simul jam et alterum spectandum est, quid me facere par sit: atque hoc præferam.

3 Occurrit sæpe in Romanis historiis locutio, tradere se in fidem, tradere in fidem et clementiam. Sic apud Livium lib. XXXVII. *Legationes finitimas tradentes in fidem civitates suas benigne audivit.* Lib. XLV. *Paulo, ut se suaque omnia in fidem et clementiam populi Romani permitteret, contendente,* ubi de rege Perseo sermo est: sciendum autem est, his verbis nihil aliud quam deditionem meram intelligi: [k]neque fidei nomen his in locis aliud significare, quam ipsam probitatem victoris, cui se victis committit.

Cap. 9.
Cap. 4.

4 [l]Nobilis est apud Polybium et Livium historia de Phanea Ætolorum legato, qui in oratione ad Manium consulem eo prolapsus est ut diceret: *διότι κέκριται τοῖς Αἰτώλοις σφᾶς αὐτοὺς ἐγχειρίζειν εἰς τὴν Ῥωμαίων πίστιν·* (ita vertit Livius) *se suaque omnia fidei populi Romani permittere.* Cumque percunctanti consuli iterum id affirmasset, postulasse consulem, ut quidam belli incentores sibi sine mora dederentur. Cum Phaneas excepisset, *non in servitutem, sed in fidem tuam nos tradimus,* et, quod imperaretur, non esse moris

Polyb. *Exc. Leg.* 13. p. 1116. Lib. xxxvi. 28.

[k] *Neque fidei nomen his in locis aliud significare quam ipsam probitatem victoris, cui se victus permittit*] Polybius: *παρὰ Ῥωμαίοις ἰσοδυναμεῖ τό τε εἰς τὴν πίστιν αὑτὸν ἐγχειρίσαι, καὶ τὸ τὴν ἐπιτροπὴν δοῦναι περὶ αὑτοῦ τῷ κρατοῦντι· apud Romanos idem valent, se in fidem alicujus committere, et victori de se statuendi liberam facere potestatem.* (Ibid.) Græci dicunt, *εἰς*

3 We find, in the Roman historians, mention of surrendering to the faith, or the faith and clemency, of the adversary. See Livy, concerning Perseus. But all these expressions mean nothing but mere surrender. *Faith,* in such cases, means only the probity of the victor to whom the vanquished party commits himself.

4 There is a celebrated history, in Polybius and Livy, of Phaneas, the ambassador of the Etolians; who, in his oration to Manlius the consul, went so far as to say that the Etolians gave themselves up to the faith of the Romans. Then, when the consul asked again, and he had repeated the assertion, the consul asked that certain persons who had been the movers of the war should be given up. When Phaneas had objected, *We give ourselves up to your faith, not to slavery,* and that what was demanded was not according to Greek usage, the consul replied that he did not care for Greek usage; that by Roman usage he had authority over those who had surrendered deliberately; and ordered forthwith the ambassadors to be thrown into chains. *Do*

Græcorum, respondisse consulem, nihil se curare, quid Græci esset moris, se more Romano imperium habere in deditos suo decreto, et catenis vinciri legatos jussisse. In Græco est, περὶ τοῦ δέοντος καὶ καθήκοντος ποιεῖτε λόγον, δεδωκότες ἑαυτοὺς εἰς τὴν πίστιν; *de officio et decoro hic disputatur, cum jam vos fidei nostræ permiseritis?* Ex his verbis apparet, quantum impune et non violato gentium jure facere possit is, in cujus fidem populus aliquis se permisit. Neque tamen hac potestate usus est Romanus consul, sed et legatos dimisit, et Ætolorum concilio de integro deliberandi fecit potestatem. Sic populus Romanus Faliscis respondisse legitur, edoctum se, Faliscos se non potestati sed fidei Romanorum commisisse: et de Campanis legimus, eos non fœdere sed deditione in fidem venisse.

Val. Max. vi. 5. n. 1.

Liv. viii. 2.

5 Ad officium vero ejus, cui facta est deditio, non male retuleris Senecæ illud: *clementia liberum arbitrium habet: non sub formula, sed ex æquo et bono judicat, et absolvere illi licet, et quanti vult taxare litem.* Neque referre existimo, an dedens se dicat se dedere alterius sapientiæ, an moderationi, an misericordiæ: hæc enim omnia blandimenta sunt; res manet, ut victor arbiter fiat.

Lib. ii. *de Clem.* 7.

δίκην σφᾶς αὐτοὺς παραδιδόναι, ut Thucydides libro III. (cap. 67) ait: καθ' αὐτῶν ἐπιτρέπειν ἐξουσίαν, ut Diodorus Siculus Lib. XIV. [Cap. 112. pag. 453. *Ed. H. Steph.* ubi additur, τὴν πᾶσαν etc.]

[1] *Nobilis est apud Polybium*] In excerptis legationum num. 13.

you, he said, *talk of duty and decorum, when you have given yourselves up to our faith?* From which words, we see how much may be done with impunity, and without violating the Laws of Nations, by him to whose faith an adversary has surrendered himself. For the Roman consul did not use this power; but dismissed the ambassadors, and allowed the Etolian council to deliberate afresh on this subject. So the Roman people answered to the Falisci, that it had learnt, that they had committed themselves, not to the power, but to the faith of the Romans; and of the Campanians, we read that they came into faith with the Romans, not by league, but by surrender.

5 But with reference to the duty of him to whom the surrender is made, we may apply what Seneca says: *Clemency is not governed by the rules of law, but judges fairly, and can absolve the offender, or tax the contest at what rate it pleases.* Nor do I conceive that it makes any difference, whether he who surrenders, professes to give himself up to the wisdom, or moderation, or mercy of the victor. All these are merely soft words: the fact remains, that the victor is the arbiter.

LI. Sed sunt tamen et deditiones conditionatæ, quæ aut singulis consulunt[8], ut quibus vita salva, aut corporum libertas, aut et quædam bona excipiuntur; aut etiam universitati: quarum nonnullæ etiam mixtum quoddam imperium possunt inducere, de quo egimus alibi. Lib. i. 3. § 17.

LII. Accessiones pactionum sunt obsides et pignora. [m]Obsides diximus dari aut sua voluntate, aut ejus qui imperium habet: nam in summo civili imperio comprehenditur et jus in actiones subditorum, ut in bona. Sed civitas aut ejus rector tenebitur illud incommodum ei, qui patitur, aut proximis repensare; et si plures sint, quorum quis obses erat, reipublicæ nihil intersit, danda opera videtur, ut sorte res dirimatur. In vasallum, nisi idem subditus sit, jus hoc feudi dominus non habet: neque enim reverentia et obsequium, quæ debet, huc usque pertingunt.

LIII. Interfici obsidem posse diximus per jus gentium externum; non etiam interno jure, nisi par ipsius culpa accedat. Servi quoque non fiunt: imo et jure gentium bona

[8] Sic Phocæenses, dum sese dedunt Æmilio, *pacti, ne quid hostile paterentur,* narrante LIVIO, Lib. XXXVII. c. 32. num. 10. *J. B.*

[m] *Obsides diximus dari*] Hoc libro, c. iv. § 14. vide et caput xi. § 18.

LI. There are also conditional surrenders, which secure the interests of individuals; so that their lives, or liberties, or goods, are excepted; or of the whole body; and some such conventions may even give rise to a mixed authority between the parties; of which we have elsewhere spoken.

LII. Hostages and Pledges are accessories to conventions. Hostages, as we have said, are given either by their own will, or the will of him who has authority over them. For in a supreme civil sovereignty, is comprehended a right over the actions of subjects, as well as their goods. But the state, or its ruler, will be bound to make compensation for the inconvenience to the person who suffers, or his near relations. And if there are several persons, among whom it makes no difference to the state which is the hostage, it appears proper that the matter should be settled by lot. A vassal, except he be a subject also, is not liable to such a right on the part of the seignior: for the reverence and obedience which he owes his lord do not go so far as this.

LIII. The putting to death a hostage is, as we have said, lawful by the external Law of Nations; but not by internal rightness, except there be a corresponding crime on his side. Also hostages do not become slaves: but on the contrary, by the Law of Nations they can

habere et heredibus relinquere possunt, quanquam Romano jure cautum est, ut bona eorum in fiscum cogantur. *L. Divus.* 31. *D. de jure fisci.*

LIV. An fugere obsidi liceat, quæritur? et constat non licere, si ab initio aut postea, quo laxius haberetur, fidem dederit. Alioqui videtur non is animus fuisse civitatis obligandi civem ne aufugeret, sed hosti dandi facultatem qualis vellet custodiæ. Et sic defendi potest Clœliæ factum. Sed etsi ipsa nihil peccaverat, [n]civitas tamen recipere et retinere obsidem non poterat. Sic Porsenna: *si non dedatur obses, pro rupto se fedus habiturum.* Deinde: *Romani pignus pacis ex federe restituerunt.* Liv. ii. 13. *Dict.* c. 13.

LV. Odiosa autem est obsidum obligatio, tum quia libertati inimica, tum quia ex facto alieno venit. Ideoque stricta interpretatio hic locum habet: quare in unam causam dati, in aliam retineri non poterunt: quod ita intellige, si aliud quid sine obsidum accessione promissum sit. At si in alia causa fides jam violata sit, aut contractum debitum, jam poterit obses retineri, non ut obses, sed eo gentium jure, quo subditi

[n] *Civitas tamen recipere et retinere obsidem non poterat*] Vide Plutarchum in *Publicola* hac de re. (Pag. 107.) Ad illud Virgilii (*Æn.* VIII. 651):

Vinclis innaret Clœlia ruptis.

Vinculis federis ait Servius:

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hold property and leave it to their heirs; though by the Roman law, it is provided that their goods shall go into the public treasury.

LIV. It is made a question, whether it is lawful for a hostage to make his escape. And it appears plainly that it is not lawful, if, either at first, or afterwards, he have given his word, in order to be in looser custody. Without such a condition, it would seem that the state had not the intention of binding its citizen not to escape, but of giving the enemy the power of keeping him as they chose. And in this way, the act of Clelia may be defended. But although she had not been in fault, the city could not receive and keep the hostage. So Porsenna: *If the hostage were not given up, he would hold the treaty broken:* and so *the Romans gave up the pledge of peace according to the treaty.*

LV. However, the obligation of hostages is odious; both because it is against liberty, and because it punishes a person for what another has done. Therefore, in such cases, a strict interpretation is applicable. And thus, persons given up on one account cannot be retained on another: which is to be understood with this condition, If anything else be promised without the stipulation of hostages. But if, in the other cause, faith have been violated, or a debt contracted, the hostage may then be retained; not as a hostage, but by that part of the Law of Nations by which subjects may be detained for the act of their

Vide supra iii. 2.

ex facto imperantium detineri possunt, κατ' ἀνδροληψίαν: quod ipsum tamen ne fiat, caveri poterit, adjecto pacto de reddendis obsidibus, ubi id, cujus nomine dati erunt, impletum erit.

LVI. Qui obses datus est, tantum ut alterum captivum aut obsidem redimat, eo mortuo liberatur: nam in illo, dum moritur, jus pignoris exstinctum est, ut in captivo redemto dixit Ulpianus. Quare, sicut in Ulpiani quæstione pretium non debetur, quod in personæ locum successit, ita nec hic persona manebit obligata, quæ personæ vicaria facta est. Sic Demetrius à senatu Romano non inique postulabat dimitti, ὡς Ἀντιόχου μὲν ἀντιδοθεὶς, Ἀντιόχου δὴ ἀποθανόντος, inquit Appianus. Justinus ex Trogo: *Demetrius, qui obses Romæ erat, cognita morte Antiochi fratris, senatum adiit, obsidemque se* (malim legere *obsidem inquiens se*[9], ut cohæreat oratio) *vivo fratre venisse, quo mortuo, cujus obses sit, ignorare.*

L. si patre 15. *D. de capt.*

Syr. Bell. p. 117.
Lib. xxxiv. 3.

LVII. Rege autem, qui fedus fecit, mortuo, an teneatur adhuc obses, pendet ab eo, quod alibi tractavimus, an fedus habendum sit personale an reale: nam accessoria non pos-

Lib. ii. 16. § 16.

[9] Hanc conjecturam, tacito nomine Auctoris, rejicit Matthias Berneccerus; tuetur autem J. Schefferus, nisi *que* detrahatur de voce *Obsidem*, ut habent nonnulli MSS. Quod ultimum verius videtur. *J. B.*

rulers. But it may be provided that this shall not be done, by adding a covenant, that the hostages shall be given up, when that, on account of which they were given, has been fulfilled.

LVI. He who is given as a hostage, only to redeem another who is a prisoner or a hostage, is liberated, on the death of that other. For in him, when he dies, the right of the pledge is extinguished; as Ulpian said of a prisoner who is ransomed [and dies before the ransom is paid]. Wherefore, as in Ulpian's question, the price is not due, so here too, the person of the vicarious hostage is not bound. Thus Demetrius justly demanded of the Roman senate to be set free, as having been given up for Antiochus, and Antiochus being dead. This being so, he said he did not know whom he was hostage for.

LVII. When the king is dead who made the convention, whether the hostage be still bound, depends on the question which we have elsewhere treated, whether the convention is to be held personal or real: for accessory circumstances, such as hostages, cannot be a reason for receding from the rule, in the interpretation of the main articles. The accessories must follow the nature of the main business.

sunt efficere, ut in principalium interpretatione a regula recedatur: ejus autem naturam et ipsa sequi debent.

LVIII. Obiter hoc addendum est, obsides interdum non accessionem esse obligationis, sed revera partem principalem: ut cum quis ex contractu factum promittit non suum, et quia, eo non præstito, tenetur ad id quod interest, ejus vice obsides obligantur: quam fuisse videri sententiam Caudinæ sponsionis diximus alibi. Non dura tantum, sed et iniqua est sententia Lib. ii. 15. § 16. existimantium, obsides etiam sine consensu suo alterum ex Alb. Gent. ii. 19. facto alterius posse obligari.

LIX. Pignora quædam communia habent cum obsidibus, quædam propria. Commune, quod et ex alio jam debito retinentur, nisi obstet data fides: proprium, quod quæ de iis est pactio, non tam stricte sumitur, quam illa de obsidibus: neque enim æquale est odium. Res enim natæ sunt, ut teneantur, non et homines.

LX. Illud alibi quoque diximus, nullum tempus id efficere posse, ne luitio sit pignoris, si id præstetur, pro quo pig- Lib. ii. 4. § 15. nus suppositum est. Nam qui actus causam veterem et notam habet, non creditur ex nova procedere. Ideo patientia debi-

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LVIII. This however may be added in passing: that sometimes the hostages are not an accessory part of the obligation, but really a principal part; as when any one, by contract, promises something to be done by another; and, that not being performed is held to the amount of interest involved in the agreement; then his hostages are bound in his place; which was the doctrine held in the Caudine convention, as we have elsewhere stated. The opinion of those who hold that hostages are bound for one another's acts, even without their own consent, is hard and unjust.

LIX. Pledges have some points in common with hostages, some, peculiar. It is common to the two, that being given for one thing, they may be retained for another, except a stipulation to the contrary have been made. And it is peculiar to Pledges, that the covenant which is made concerning them, is not to be taken so strictly as that concerning hostages: for things are made, to be held as property; men are not.

LX. We have also said elsewhere, that no period of time can supersede the obligation of restoring the pledge, if that be done to secure which the pledge was deposited. For an act which has an old and known cause is not to be believed to come from a new one. Therefore the forbearance of the debtor [who deposited the pledge]

toris veteri contractui, non derelictioni imputatur, nisi certæ conjecturæ aliam interpretationem exprimant: ut si quis luere cum vellet, impeditus id silentio transmisisset tanto tempore, quod ad consensus conjecturam sufficere possit.

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is to be ascribed to the old contract, not to derelict; except well-founded conjectures point to another interpretation: as if when any one wished to resume the pledge, and was prevented, he had passed it over for so long a time as to give room for a presumption of consent.

CAPUT XXI.

DE FIDE MANENTE BELLO, UBI DE INDUCIIS, COMMEATU, CAPTIVORUM REDEMTIONE.

I. *Induciæ quid sint, et an id tempus veniat pacis an belli nomine.*
II. *Vocis origo.*
III. *Nova indictione post inducias non opus.*
IV. *Quomodo computanda sint tempora induciis præfinita.*
V. *Quando obligare incipiant.*
VI. *Quid per inducias liceat.*
VII. *An retrocedere et reficere mœnia, et similia:*
VIII. *De locis occupandis distinctio.*
IX. *An redire possit, qui vi majore retentus est, circa exitum induciarum.*
X. *De specialibus induciarum pactionibus, et quæ inde quæri solent.*
XI. *Induciarum pactionibus ab altera parte ruptis, alteram bellum movere posse.*
XII. *Quid si pœna addita fuerit?*
XIII. *Privatorum facta quando inducias rumpant.*
XIV. *In jure commeandi extra inducias qualis sumenda interpretatio.*
XV. *Qui militum nomine veniant.*
XVI. *Ire, venire, abire, quomodo hic accipienda:*
XVII. *De extensione ad personas:*
XVIII. *Ad bona.*
XIX. *Comitis et gentis nomine qui veniant:*
XX. *An concessio juris commeandi morte extinguatur:*
XXI. *Quid si data sit, donec qui dedit voluerit?*
XXII. *An securitas et extra territorium debeatur.*
XXIII. *Favor redemtionis captivorum:*
XXIV. *An lege interdici redemtio possit, distinctione explicatur.*
XXV. *Jus in captivum cedi posse:*
XXVI. *Posse ab uno pretium pluribus deberi:*
XXVII. *Conventio an rescindi possit, ob divitias captivi ignoratas.*
XXVIII. *Quæ bona capti captorem sequantur.*
XXIX. *An heres pretium debeat, distinctione explicatur.*
XXX. *An redire debeat qui dimissus est, ut alterum liberet, eo mortuo.*

I. 1 SOLENT et inter bellum a summis potestatibus concedi quædam, ut cum Virgilio et Tacito loquar, belli *Æn.* x. 532.
commercia, Homero συνημοσύναι, qualia sunt induciæ, com- *Ann.* xiv. 33. et *Hist.* iii. 81. *Iliad.* xxii. v. 261.

CHAPTER XXI. *Of Faith while war continues; of Truce; of Safe Passage; of Ransom.*

I. 1 Even during war, the supreme authorities are wont to grant

meatus, captivorum redemtio. Induciæ sunt conventio, per quam, bello manente, ad tempus bellicis actibus abstinendum est. Bello, inquam, manente: nam, ut Cicero ait Philippica
Cap. 1. octava, inter bellum et pacem nihil est medium: et bellum status est nomen, qui potest esse etiam cum operationes suas non exserit: δοκεῖ ἐνδέχεσθαι καὶ καθεύδειν ἔχοντα τὴν
Ethic. Nic. i. 3. ἀρετὴν ἢ ἀπρακτεῖν διὰ βίου, ait Aristoteles: *fieri potest ut virtute quis sit præditus et aut dormiat aut vitam agat*
Lib. viii. 6. *actione vacuam.* Idem alibi: οἱ τόποι οὐ διαλύουσι τὴν φιλίαν ἁπλῶς, ἀλλὰ τὴν ἐνέργειαν· *non ipsam amicitiam dissolvunt locorum intervalla, sed usum ejus.* Andronicus
Paraph. i. 14. p. 47. Rhodius: τὴν ἕξιν ἐνδέχεται ὑπάρχουσαν μηδὲν ἀποτελεῖν· *habitus esse potest, ita ut nihil operetur.* Eustratius ad
Cap. 1. sextum *Nicomacheorum:* ἡ ἕξις πρὸς τὴν ἁπλῶς δύναμιν ἐντελέχεια λέγεται· πρὸς δὲ τὴν ἐνέργειαν καὶ προαίρεσιν δύναμις, ὡς ἐν τῷ κοιμωμένῳ γεωμέτρῃ γεωμετρία· *habitus, potentiæ simpliciter dictæ ratione habita, actus dicitur: at ipsi actioni sive exercitio comparatus vocatur potentia, ut ars mensoria in dormiente mensore.*

Hor. i. Sat. 3. v. 129, et seqq.

> [a]Ut quamvis tacet Hermogenes, cantor tamen atque
> Optimus est modulator: et Alfenus vafer omni
> [b]Abjecto instrumento artis, clausaque taberna
> Sutor erat.

[a] *Ut quamvis tacet Hermogenes*] Seneca *de Beneficiis* iv. c. 21. *Est disertus, etiam qui tacet.*

[b] *Abjecto instrumento artis, clausaque taberna Sutor erat*]

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certain kinds of intercourse among the hostile parties; as Truce, Safe Passage, Ransom. Truce is a convention, by which, the war remaining, the parties are for a time to abstain from warlike acts. I say, the war remaining; for as Cicero says, between war and peace, there is no medium; and war is the name of a state or condition which may exist, even when it does not exhibit its operations: according to Aristotle's distinction, of virtues or qualities which may continue to exist, even while they are not exerted. And so his commentators, as Andronicus, speak of a habit which exists without the act; and Eustratius, who exemplifies it by a geometer in whom geometry resides, though he be asleep. And so Horace.

2 And thus, as Gellius says: *A truce is not peace; for the war remains, though the fighting ceases.* And in another: *A truce is a suspension of war.* Which I mention to shew that if any convention be made which is to be valid in time of war, it is valid also during a truce, except it plainly appear that, in the convention, it is not war which is looked to, but the operations of war. And on the other hand,

2 Sic ergo, ut et Gellius dixit, *non pax est induciæ:* Noct. Attic. i. 25.
bellum enim manet, pugna cessat. Et in panegyrico Latini Cap. 9.
Pacati legimus: *induciæ bella suspendebant.* Quod eo dico ut sciamus, si quid convenit, ut belli tempore valeat, id per inducias quoque valere, nisi manifeste appareat, non statum spectari sed ipsas functiones. Contra, si quid de pace dictum erit, id induciarum tempore locum non habebit; quanquam Virgilius pacem sequestram dixit, Servius ad eum locum Æn. xi. 133.
pacem temporalem, ut et Thucydidis scholiastes εἰρήνην πρόσ- Ad Lib. i. 40. p. 24. n. 3.
καιρον, πόλεμον ὠδίνουσαν, Varro pacem castrorum, pauco- ed. Oxon.
rum dierum: quæ omnes sunt non definitiones sed delineationes quædam, eæque figuratæ. Qualis et illa Varronis, cum inducias dixit bellorum ferias, potuerat et belli somnum dicere. Sic et ipsas forenses ferias pacem vocavit Papinius; et somnum[1] Aristoteles vinculum sensuum, quo exemplo et inducias belli vinculum recte dixeris.

3 In M. Varronis autem expositione, quam et Donatus Ad Ter. Eun. act. 1. sc. 1. v. 15.
sequitur, hoc recte reprehendit Gellius, quod paucos dies adje- Lib. i. 25.
cit, ostendens solere et in horas dari, addam ergo et in annos etiam viginti, triginta, quadraginta, etiam centum: quarum apud Livium exempla, quæ et illam Pauli Jurisconsulti defi- L. postlim. 19. D. de
nitionem redarguunt: *induciæ sunt cum in breve et in præ-* capt. § 1.
sens tempus convenit, ne invicem se lacessant.

Seneca dicto jam loco: *artifex est etiam cui ad exercendam artem instrumenta non suppetunt.*

[1] Vide Philosophi Librum *De Somno et Vigilia*, cap. 3. in fine. *J. B.*

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if anything is said of peace, that will not hold for the time of truce: although Virgil calls a truce *a sequestral peace*, which Servius, on the passage, explains as a temporary peace. As also the Scholiast on Thucydides, *an occasional peace*, or *a war in labour*. Varro calls it *a camp-peace, a peace of a few days;* but all these are not definitions, but descriptions, and metaphorical descriptions. So too is that of Varro, when he calls a truce *the holiday* or *vacation of war*. He might have called it *a slumber of war*. So the holiday produced by the forensical ceremonies is called a peace by Papinius. Aristotle calls sleep *the chain of the senses;* and adopting that image, you might call a truce *the chain of war*.

3 In the exposition of Varro's words which Donatus follows, Gellius rightly reprehends his having added, "a peace *of a few days;*" and he shews that truces were granted for hours. And I add further, that truces have been made for years, as twenty, thirty, forty, even a hundred; of which we have examples in Livy, which shew the error of

4 Fieri tamen poterit, ut si appareat, alicujus conventionis rationem unicam et per se moventem in solidum fuisse cessationem actuum bellicorum, ut tunc, quod de pacis tempore dictum est, per inducias valeat, non ex vi vocis, sed ex mentis certa collectione, de qua alibi legimus.

Lib. ii. 16. § 20.

II. Videtur autem induciarum nomen non ab eo, quod Gellius vult, *inde uti jam*, nec ab *endoitu*, id est, introgressu, ut Opilius voluit, venisse, sed quod *inde*, id est, a certo tempore *otium* sit, quomodo ἐκεχειρίαν Græci vocant. Apparet enim etiam ex Gellio et Opilio, veteribus per *t*, non per *c* literam scriptum hoc nomen, quod nunc pluraliter profertur, olim haud dubie etiam singulariter. Vetus scriptura fuit *indoitia:* nam *otium* tunc *oitium* enunciabant a verbo *oiti*, quod nunc *uti* dicimus, [c]sicut ex *poina* (nunc *pœnam* scribimus) fit *punio*, et ex *Poino* (qui nunc *Pœnus*) fit *Punicus*. Sicut autem ex eo quod est *ostia*, *ostiorum*, factum est nomen [d]*Ostia Ostiæ:* sic ex *indoitia indoitiorum*, factum est *indoitia*, *indoitiæ*, deinde *indutia*, cujus, ut dixi, plurale nunc tantum in usu est: olim, ut Gellius monuit, etiam unitatis numero enun-

Gell. xix. 8.

d. loco.

[c] *Sicut ex poina (nunc pœnam scribimus) fit punio*] Vide Servium in x. *Æneidos* ad vocem *mœrorum*. (vers. 24.)

[d] *Ostia Ostiæ*] Et ex *ostrea*, *ostre-*

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that definition of Proclus the Jurist: *A truce is, when for a short and present time, a convention is made, that the parties are not to attack each other.*

4 It may however happen, that if it appear that the sole moving reason of any convention was the cessation of warlike acts, that then, what is said of the time of peace shall hold for a time of truce; not from the force of the word, but from the clear inference of intention, of which we have elsewhere spoken.

II. The name *Induciæ* does not come, as Gellius would have it, from *inde uti jam;* nor as Opilius holds, from *endoitu*, that is, introgression; but from *inde otium*, because from a certain time there is a cessation of acts. It appears also, from Gellius and Opilius, that the ancients wrote this word with the letter *t*, not *c*; and that though now it is plural only, it formerly had a singular. The old form was *indoitia*, for *otium* was then written *oitium*, from the verb *oiti*, which later became *uti;* as from *poina* (afterwards *pœna*) came *punio*, and from *Poino* (afterwards *Pœnus*) came *Punicus*. And as from *ostia* in the plural, *ostia*, *ostiorum*, a door, came the singular *ostia*, *ostiæ;* so from the plural *indoitia*, *indoitiorum*, came *indoitia*, *indoitiæ*, and thence *indutia*, of which, as I have said, the plural only remains in use, though the singular formerly was used, as Gellius tells us; Donatus is

ciabatur: non longe abit Donatus, cum inducias dictas vult, quod in dies otium præbeant. Sunt ergo induciæ in bello otium[2], non pax: itaque accurate loquuntur historici, qui narrant sæpe, pacem negatam, inducias datas. Ad Ter. *Eun.* i. 1. 15. Liv. Plut. Justin.

III. Quare nec nova indictione opus erit: nam sublato impedimento temporali, ipso jure se exserit status belli non mortuus sed sopitus, ut dominium et patria potestas in eo qui a furore convaluit. Legimus tamen apud Livium, ex fecialium sententia finitis induciis indictum bellum: sed nimirum istis non necessariis cautionibus ostendere veteres Romani voluerunt quantopere pacem amarent, et quam justis de causis in arma traherentur. Innuit hoc ipse Livius: *cum Veientibus nuper acie dimicatum apud Nomentum et Fidenas fuerat, induciæque inde, non pax facta, quarum et dies exierat, et ante diem rebellaverant: missi tamen feciales, nec eorum, cum more patrum jurati repeterent res, verba sunt audita.* Ang. *l. si unus.* § 1. *D. de pact.* *Mart. Laud.* q. 29. Lib. iv. 30.

IV. 1 Tempus induciis asscribi solet aut continuum, ut in centum dies, aut cum designatione termini, ut usque calen-

orum, factum est *ostrea, ostreæ.*

[2] De toto isto argumento confer Pufendorfium nostrum, *De Jure Nat. et Gent.* Lib. vii. cap. 7. § 3, *et seqq.* *J. B.*

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not far from this etymology, when he says that *Induciæ* were so called because they give *in dies otium*, cessation for days. *Induciæ*, or Truce, then, is a cessation of acts in war, not a peace; and therefore the historians speak accurately, when they say that peace was denied, but truce granted.

III. And therefore there is no need of a new declaration of war after a truce: for the temporary impediment being removed, the state of war comes into play, as a matter of right; it was not dead, but only sleeping; and revives, as the right of ownership or of paternal power revives, in a man who recovers from a state of lunacy. Still we read in Livy, that in pursuance of the opinion of the Feciales, when the truce was over, war was declared: but in fact, the old Romans wished to shew, by those superfluous cautions, how much they loved peace, and by how just causes they were drawn into arms. Livy implies this: *Truce was granted, not peace made; the last day of the truce had passed, and before that day, they had resumed hostilities; yet the Feciales were sent, and when they made their formal application, they were disregarded.*

IV. 1 The time of a truce is commonly defined by its length, as, for a hundred days; or by fixing the end of the term, as, till the first

das Martias. In priori ad momenta temporum facienda est numeratio: id enim naturæ convenit: nam, quæ sit ad civiles dies computatio, ex legibus aut populorum moribus venit. In altero genere dubitari solet, utrum ad quem diem aut mensem, aut annum dictum est duraturas inducias, is dies, mensis, annus exclusus an comprehensus intelligatur.

L. anniculus. 134. D. de verb. signif.

2 Certe in rebus naturalibus duo sunt terminorum genera, intra rem, ut cutis terminus est corporis: extra rem, ut flumen terminus est terræ. Ad utrumque hunc modum, etiam qui voluntate constituuntur, termini constitui possunt. Magis autem naturale videtur, [e]ut terminus sumatur qui pars sit rei: *πέρας λέγεται τὸ ἔσχατον ἑκάστου, terminus dicitur quod ultimum cujusque est,* inquit Aristoteles: nec usus repugnat: *si quis sic dixerit, ut intra diem mortis ejus aliquid fiat, ipse quoque dies, quo quis mortuus est, numeratur.* Prædixerat Cæsari Spurina periculum, quod non ultra Idus Martias proferretur. Interpellatus ipsis Idibus, dixit [f]venisse quidem, sed non præteriisse. Quare multo magis sumenda est

Met. v. 17.

L. si quis 133. D. de verb. signif.

Suet. *in Cæs.* c. 81.

[e] *Ut terminus sumatur qui pars sit rei*] Baldus de statutis in verbo *usque.* Bartolus in l. patronus. D. de legatis III. et l. nuptæ. D. de senatoribus. Archidiaconus in c. ecclesias XIII. q. 1. Hieronymus de Monte libro de finibus c. 23.

[f] *Venisse quidem, sed non præteriisse*] Dion: *πάρεστιν, οὐδέπω δὲ παρελήλυθεν.* (Lib. XLIV. pag. 281 E. *Ed. H. Steph.*) Appianus: *πάρεισιν αἱ Εἰδοί, ἀλλ' οὐ παρεληλύθασιν.* [Postrema verba non tantum sunt Appiani, (*De*

of March. In the former case, the reckoning is to be made even to minutes: for that is the natural way. The cessation by civil days comes from law, or the customs of peoples. In the other case, it is often a doubt, whether the day or month or year to which the truce was to last is excluded or included in the truce.

2 Certainly in natural things there are two kinds of boundary; the one, within the thing, as the skin is the boundary of the body: the other without the thing, as a river is the boundary of the land. And so, boundaries which are made by the will of man, may be settled either the one way or the other. But it seems more natural, that a boundary should be taken which is a part of the thing: *a terminus is the last part of a thing,* as Aristotle says: nor is use against this. The lawyers say: *If any one says that a thing is to be done before the day of his death, the day on which he dies is reckoned in.* Spurina predicted to Cesar a danger which would not be protracted beyond the Ides of March. And when he was interrogated on the Ides themselves, he said the Ides were come, but not gone. And therefore this interpretation is much the rather to be taken, when the prolongation

hæc interpretatio, ubi temporis productio favorem in se habet, ut in induciis quæ humano sanguini parcunt.

3 At vero, a quo die mensura aliqua temporis incipere dicitur, is dies intra mensuram non erit: quia ejus propositionis vis est discernere, non conjungere.

V. Illud obiter addam, inducias et si quid est simile, ipsos contrahentes statim obligare ex quo contractus absolutus est: at subditos utrinque obligari incipere, ubi induciæ acceperunt formam legis, cui inest exterior quædam publicatio: qua facta statim quidem incipit habere vim obligandi subditos, sed ea vis, si publicatio uno tantum loco facta sit, non per omnem ditionem eodem momento se exserit, sed per tempus sufficiens ad perferendam ad singula loca notitiam. Quare si quid interea a subditis contra inducias factum sit, ipsi a pœnis immunes erunt, [g] neque tamen eo minus contrahentes damnum resarcire debebunt. Bart. *ad l. omnes pop.* Pan. *c. 2. de const. et ibid.* Fel. n. 7.

VI. 1 Quantum per inducias liceat, quantum non liceat, ex ipsa definitione datur intelligi. Illiciti enim sunt omnes

Bell. Civ. Lib. II. pag. 522.) sed et PLUTARCHI, qui tribuit ea Haruspici, Cæsarem de adventu Iduum sibi gratulantem castiganti, *Vit. Cæs.* pag. 737 E. Tom. II. *Ed. Wech. J. B.*

[g] *Neque tamen eo minus contrahentes damnum resarcire debebunt*] Ut de Scione apud Thucydidem IV. (Cap. 122.) Defendi itaque non potest quod ab Hispanis in Italia factum narrat Mariana XXVIII. 7.

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of the time has a favourable effect; as in a truce which spares human blood.

3 But the day from which any measure of time is said to begin is not included; because the force of the preposition *from* is to disjoin, not to conjoin.

V. I will add this by the way, that a truce or any similar transaction binds the contracting parties immediately, as soon as the contract is made: but that subjects on both sides begin to be obliged, when the truce has taken the form of a law, in which is involved some external publication: and this being done, it immediately begins to have force to oblige subjects: but that force, if the publication is made at one place only, does not operate through the whole government at the same moment; but in a time sufficient to carry the knowledge to each place. Wherefore, if anything be in the mean time done by the subjects against the truce, they will not be liable to punishment: but nevertheless the contracting parties will be bound to make good the damage.

VI. 1 What is lawful during the truce, and what is not, is given to be understood by the terms themselves which are employed. All

actus bellici, sive in personas, sive in res, id est, quicquid vi fit adversus hostem: id enim omne per induciarum tempus fit contra jus gentium, ut in concione ad milites loquitur L. Lib. xl. 27. Æmilius apud Livium.

2 Etiam quæ res hostium casu aliquo ad nos pervenerunt, eæ reddendæ erunt, etiamsi ante nostræ fuissent: quia, quod jus externum attinet, ex quo hæc dijudicanda sunt, ipsorum sunt factæ: et hoc est, quod ait Paulus jurisconsultus, *L.* 19. § 1. *D. de Captiv.* induciarum tempore postliminium non esse, quia postliminium requirit, ut antecedat jus bello capiendi: quod per inducias non est.

3 Ire et redire ultro citroque, sed eo paratu, qui pericu- *Æn.* xi. 134. lum nullum ostentet, licet. Notatum hoc [h] a Servio ad illud Maronis, *Mixtique impune Latini,* ubi et hoc narrat, obsessa urbe a Tarquinio inter Porsennam et Romanos factis induciis, cum ludi Circenses in urbe celebrarentur, ingressos hostium duces curuli certamine contendisse et victores coronatos.

VII. Interius recedere cum exercitu, quod Philippum Lib. xxxi. 38. Add. Front. ii. 13. n. 8. fecisse legimus apud Livium, cum induciis non pugnat: nec

[h] *A Servio*] Ad xi. *Æneidos.* (vers. 134.)

[i] *Nisi quid specialius convenerit*] Ut apud Parutam Lib. iii.

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acts of war, whether against persons or against things, are unlawful; that is, everything that is done against an enemy. Everything of that kind is, in time of truce, against the Law of Nations; as L. Emilius says in his speech to the soldiers in Livy.

2 Even things belonging to the enemy, which have, by any chance, come into our hands, are to be restored; and this, even if they had previously been ours: because, so far as regards external right, by which such things are to be judged, they have become theirs. And this is the purport of what Paulus the jurist says, that in time of truce, there is no postliminium; because postliminium requires that the right of capture in war should precede; which, in time of truce, cannot be.

3 It is lawful to go and return on either side, but with such apparatus only as shews that there is no danger. This is remarked by Servius upon Virgil, *Mixtique impune Latini:* where he also relates, that when the city was besieged by Tarquin, and truce was made between Porsenna and the Romans, when the Circensian games were celebrated in the city, the leaders of the enemy entered and contested in a chariot-race, and were crowned as victors.

VII. To retire into the interior of our own territory, as we read in Livy that Philip did, is not at variance with a truce; nor to repair

reficere mœnia, nec militem conscribere, [i]nisi quid specialius convenerit.

VIII. 1 Corruptis hostium præsidiis loca invadere quæ ipsi tenebant, haud dubie contra inducias est: talis enim acquisitio justa esse non potest, nisi ex jure belli. Idem habendum, si qui subditi deficere ad hostem velint. Exemplum est apud Livium, lib. XLII: *Coronæi et Haliartii favore* Cap. 46. *quodam insito in reges, legatos in Macedoniam miserunt præsidium petentes, quo se adversus impotentem superbiam Thebanorum tueri possint. Cui legationi responsum ab rege est, præsidium se ob inducias cum Romanis factas mittere non posse.* Apud Thucydidem libro quarto Brasidas Cap. 123. Mendam civitatem ab Atheniensibus ad Lacedæmonios deficientem induciarum tempore recipit: sed additur excusatio, quia habebat quæ ipse vicissim Athenienses criminaretur.

2 Derelicta sane occupare licet, dum vere derelicta, id est, eo animo ne amplius sint quorum fuerant, non si incustodita, sive custodia ante inducias sive factis induciis omissa sit: dominium enim manens injustam facit alterius possessionem: quo refellitur Belisarii adversus Gothos cavillatio, qui Proc. ii. *Gotth.* c. 7. tali obtentu [k]loca præsidiis nudata per inducias invaserat.

[k] *Loca præsidiis nudata*] Portum, Centum-cellas, Albanum.

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the walls of fortified places; nor to raise soldiers, except there be some more special convention.

VIII. 1 To corrupt the garrisons of the enemy, and so to obtain possession of places which they hold, is undoubtedly in contravention of a truce; for such an acquisition cannot be just, except by the right of war. The same is to be held, if subjects wish to revolt to the enemy. We have an example in Livy. *Those of Corona and Haliartus being inclined to kings, sent ambassadors into Macedonia to ask for a garrison to defend them against the Thebans; to whom the king answered, that on account of the truce with the Romans he could not send a garrison.* In Thucydides, Brasidas took possession of Menda, which revolted from the Athenians to the Lacedæmonians during the time of truce: but there is added the excuse, that he had things to complain of in return against the Athenians.

2 It is lawful in time of truce to occupy what is derelict; provided it is truly derelict, that is, left with the intention of not being resumed by those to whom it had belonged; not if it is merely unguarded; whether the custody were withdrawn before the truce, or after the truce was concluded. For the ownership remaining, makes the possession of the other party unjust. And by this rule, the false plea

IX. 1 Quæritur, an qui vi majore impeditus quo minus recederet, intra fines hosticos deprehenditur postquam exierint induciæ, jus redeundi habeat? Si jus externum gentium respicimus, non dubito quin hic par sit ei, qui cum in pace venisset bello repente exorto inter hostes fato suo deprehenditur, quem captivum manere ad pacem usque supra notavimus; neque justitia interna deest, quatenus bona et actiones hostium pro debito civitatis obligantur, et in solutum capiuntur: nec magis hic quod queratur habet, quam tot alii innocentes, in quos bellorum mala recidunt.

Lib. iii. 9. § 4.

2 Nec quæ de commissi causa circa merces tractantur adferri huc debent, nec quod apud Ciceronem est *De Inventione* secundo, de nave rostrata vi ventorum in portum delata, quam ex lege quæstor publicari volebat. Ibi enim vis major a pœna liberat; hic proprie de pœna non agitur, sed de jure quod certo tantum tempore interquiescebat. Tamen quin talem remittere benignius, quin et generosius sit, nullam habet dubitationem.

L. Cæsar. 15. *L. interdum.* 16. § *si propter.* 8. *D. de publican.*

[l] *Si obsessis datæ induciæ tantum ne oppugnentur*] Ut a Totila Neapolitanis apud Procopium. (*Gotthic.* III. 8.)

[m] *Interdum personis cavetur, non et*

of Belisarius against the Goths is refuted; for he, on such a pretence had seized in time of truce places stripped of their garrisons.

IX. 1 It is made a question, whether he who, being prevented by major force* from retreating, is caught within the boundaries of the enemy after the period of the truce has expired, has the right of returning. If we regard the external Law of Nations, I do not doubt that such a person is in the position of one who, having come in peace, is, by the sudden breaking out of war, caught by accident among enemies; and we have noticed before that such a one remains a prisoner till a peace. Nor is internal justice wanting for such a proceeding; so far as the goods and actions of enemies are bound for the debt of the state, and are taken towards its payment. Nor has such a person more ground to complain, than so many other innocent persons upon whom the calamities of war fall.

2 Nor ought there to be urged, on the other side, the cases of merchandises which, by stress of weather, are carried past the place where dues are to be paid, and which nevertheless are excused†; nor the case mentioned by Cicero, of a ship of war, forced by stress of weather into a port, where its entering was contrary to the law, and which the questor wanted to confiscate. For in these cases, the operation of

* *Force majeure:* force which cannot be effectually resisted.

† So Gronovius understands the case.

X. Sunt et quædam per inducias illicita, ob specialem conventionis naturam; ut si tantum sepeliendorum hominum causa datæ sint induciæ, nihil erit immutandum: sic [l]si obsessis datæ induciæ tantum ne oppugnentur, jam auxilia et commeatus admittere non licebit: nam cum tales induciæ alteri partium prosint, non debent interim ejus, qui dedit, causam duriorem facere. Interdum et convenit, ne commeare liceat. [m]Interdum personis cavetur, non et rebus: quo casu si ad res defendendas lædantur personæ, nihil contra inducias fiet: nam cum liceat res defendere, personarum securitas ad id quod principale est, non quod in alicujus consequentiam venit, referenda est.

XI. Si fides induciarum a parte altera rumpatur, quin læso liberum sit etiam sine indictione ad arma venire, frustra dubitatur: nam capita conventionis insunt conventioni per modum conditionis, ut paulo ante diximus. Reperias quidem in historiis exempla eorum qui sustinuerint in finem induciarum. Sed et bellum illatum Hetruscis et aliis, quod contra

Libro hoc, c. 19. § 14. et 20. § 36.

Liv. ix. 41. *et seqq.* et x. 37, 45.

rebus] Vide c. significat II. *de Judæis*. De induciis cum exceptione locorum exempla habes apud Procopium et Menandrum Protectorem.

major force excuses the party from the penalty: but in our case, the question is not properly concerning penalty, but concerning a right [of war], which was quiescent only during a certain interval of time. But that to remit such rights is more humane, and also more generous, admits of no doubt.

X. There are also some things which are unlawful during a truce, in consequence of the special nature of the convention: as if a truce is granted, only for the sake of burying the dead, nothing is to be changed; and if a truce is given to a besieged place, only that they are not to be assaulted, it will then not be lawful to admit aid and provisions: for since such a truce is given as an advantage to one of the parties, it ought not to damage the position of him who granted it. Sometimes also it is stipulated, that it shall not be lawful for persons to pass between the parties. Sometimes such passage is granted to persons, but not to things; in which case, if persons are hurt in resisting the passage of things, the truce is not broken. For since it is lawful to oppose the passage of things, the security of persons is to be referred to that which is principal, not to that which is a matter of consequential result merely.

XI. If the faith of the truce be broken on one side, there is no ground for doubting whether it be open to the other party to return to the employment of arms, even without a declaration; for the

inducias fecissent, legas: quæ diversitas argumento est, jus ita esse ut dicimus, sed eo jure uti vel non uti, in arbitrio esse ejus, qui læsus est.

XII. Illud constat, si pœna conventa poscitur et persolvitur ab eo qui contra fecit, jam bellandi jus non esse: ideo enim pœna solvitur, ut cetera salva maneant. Et contra, si bellum moveatur, recessum a pœna censeri debet, quando optio data est.

XIII. Privata tamen facta non rumpunt inducias, nisi publicus actus accedat, puta imperii aut ratihabitionis, quæ etiam intelligitur accedere, si qui deliquerint nec puniantur, nec dedantur: si non reddantur res.

XIV. Jus commeandi extra inducias privilegium quoddam est: quare in ejus interpretatione sequenda sunt quæ de privilegiis traduntur. Est autem hoc privilegium neque tertio noxium, neque danti admodum grave: ideo intra verborum proprietatem laxa magis quam stricta interpretatio admittenda

Vid. supra, ii. 16. § 12.

[n] *Alexandri fides accusata*] Plutarchus: Καὶ τοῦτο τοῖς πολεμικοῖς ἔργοις αὐτοῦ τὰ ἄλλα νομίμως καὶ βασιλικῶς πολεμήσαντος ὡς κηλὶς πρόσεστιν· *hæc velut macula adhæsit bellicis actionibus regis, cetera in bello agere*

Articles of the convention are parts of the convention, in the way of condition, as we said a little while ago. You may indeed find in history examples of persons who have continued to bear wrongs even to the end of the truce. But on the other hand, war was made against the Hetruscans and others, because they did acts against the truce; and this diversity is an argument that the right is as we say; but that, to use or not to use such right, is at the option of the injured party.

XII. This is certain, that if the penalty agreed upon is demanded and paid by him who has acted against the truce, there is then no right of going to war; for the penalty is paid that everything else may remain unviolated. And on the other hand, if the war is resumed, it is to be considered that the claim of penalty is abandoned, since the option is given.

XIII. Private acts do not touch a truce, except a public act be added; for example, an act of commanding the thing to be done, or of accepting it as valid when it is done; and these public acts are understood to be adjoined, if those who have offended are neither punished nor given up; or if the things seized are not restored.

XIV. The right of Safe Passage out of the time of truce, is a privilege; and therefore in the interpretation of this right, the rules

est, eoque magis si non petenti datum beneficium, sed ultro oblatum sit; multoque magis, si ultra privatam publica quædam utilitas in negotio vertatur. Rejicienda ergo stricta interpretatio, etiam quam ferunt verba, nisi alioqui absurdum aliquod sequeretur, aut eo ducant probabiles admodum voluntatis conjecturæ. Contra vero etiam extra proprietatem laxior interpretatio locum habebit, ut simile absurdum vitetur, aut ex valde urgentibus conjecturis.

XV. Hinc colligimus datum militibus commeatum non ad medios tantum, sed et summos duces porrigi: quia verbi proprietas admittit eam significationem, quanquam est et alia strictior. Sic nomine clericorum venit episcopus. Etiam, qui in classibus sunt nautæ, milites intelliguntur, et omnes omnino qui sacramentum dixerunt.

Can. in c. cum in cunct. 7. § cum vero. 2. De Elect. L. 1. § 1. D. de bon. poss. ex test. nul.

XVI. 1 In itu cautum et de reditu censetur, non hoc ex vi verbi, sed ut absurdum vitetur: neque enim inutile esse beneficium debet. Et abitus tutus intelligendus usque dum eo pervenerit ubi in tuto sit: unde [n]Alexandri fides accusata,

et juste et regaliter soliti. (Pag. 698 c.) Simile factum Bajazetus contra Vidynenses in Servia habes apud Leunclavium Lib. VI.

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are to be followed which are given for privileges. This privilege, however, is neither hurtful to a third person, nor very burthensome to the giver; and therefore within the propriety of the words, a lax rather than a strict interpretation is to be admitted; and still more, if it be not a boon given on asking, but voluntarily offered: and more still, if, besides private convenience, some public utility is involved in it. Therefore the strict interpretation is to be rejected, even when the words imply it, except some absurdity would otherwise follow, or very probable conjectures of intention point that way. And on the other hand, a laxer interpretation, even not included in the propriety of the words, will be applicable, to avoid a similar absurdity, or upon very urgent conjectures.

XV. Hence we collect, that Safe Passage, granted to soldiers, is extended, not only to subaltern officers as well as to common soldiers, but also to the highest in command: because the propriety of the words admits of that signification; though there is another stricter limitation of the expression. So under the title of Clerks, comes also a Bishop. Also sailors who are in fleets are included; and all who are under the oath of military obedience.

XVI. 1 In granting free passage for going, is included also returning; and this, not from the force of the word, but to avoid an absurdity: for the boon ought not to be useless. And safe depar-

Diod. Sic. xvii. 84.

qui, quibus abitum indulserat, eos in ipso itinere jussit interfici.

2 At, cui abire datum, non et redire: sed nec, cui venire concessum est, mittere poterit: nec contra: sunt enim hæc diversa, nec extra verba exspatiari ratio cogit: ita tamen ut error etsi jus non det, a pœna certe, si qua adjecta est, relevet. Sed et cui venire permissum est, semel veniet, non iterum, nisi temporis adjectio aliam suppeditet conjecturam.

L. penult. D. de precario.

XVII. Patrem filius, uxor virum non sequitur, aliter quam in jure commorandi: nam morari solemus cum familia, peregrinari sine ea. Famulus tamen unus aut alter, etiamsi expressus non sit, comprehensus censebitur in eo, quem sine tali comitatu ire indecorum foret: nam qui aliquid concedit, concedit quæ necessario sequuntur: necessitas autem hic moraliter intelligenda est.

Abbas C. Quam sit 7. De Judæis.

XVIII. Similiter bona non quævis comprehendentur, sed quæ solita sunt ad iter assumi.

o *Non etiam ubi is qui concessit desiit posse velle, quod per mortem contingit*] L. Lucius Titius 32. *de donationibus*, ita ut eam emendat vir magnus Antonius Faber, *voluero* ponens pro *volueris*. [Conject. Jur. Civ. Lib. II.

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ture is understood to extend till the person comes to a place where he is in safety. And hence, Alexander is accused of bad faith, who, having granted safe departure to certain persons, ordered them to be put to death on the way.

2 But he who is allowed to depart, is not, necessarily, allowed to return: and he who is allowed to come himself, cannot send another: nor on the contrary, can he who is allowed to send, come himself. For these are different things, nor does reason compel us in this case to wander beyond the words; but yet so that a mistake on this subject, though it do not give a right, yet relieves the person from the penalty if any be added. Also he who is allowed to come, is allowed to come once, not repeatedly; except by the addition of time, ground is given to conjecture otherwise.

XVII. The son is not allowed to accompany the father, nor the wife the husband, any otherwise than is allowed in the right of dwelling in the enemy's territory: for we are used to dwell with our families, but to travel without them. But one or two servants, even if it be not expressed, will be supposed to be comprehended in the case of a person who cannot with decorum travel without such accompaniment: for he who concedes any favour, concedes its necessary consequences: and necessity is here to be understood morally.

XIX. Expresso comitum nomine non sunt intelligendi hi, quorum causa magis est odiosa, quam ipsius cui prospicitur. Tales sunt piratæ, latrones, transfugæ, desertores. Gentis expressum nomen in comitibus, satis ostendit facultatem ad alios non porrigi.

XX. Jus commeandi cum veniat ex vi potestatis, in dubio non exstinguitur morte concedentis, secundum ea quæ alibi diximus de regum et aliorum imperantium beneficiis. Lib. ii. 14. §§ 11, 12.

XXI. Disputari solet de eo, quod dictum est in hunc modum, *quamdiu voluero*. Et verior est sententia eorum, qui existimant durare beneficium tale, etiam si novus volendi actus non intercedat, quia durare in dubio præsumitur, quod ad juris effectum sufficit; °non etiam ubi is, qui concessit, desiit posse velle, quod per mortem contingit. Persona enim sublata, collabitur etiam illa præsumtio durationis, sicut accidens interitu substantiæ. *Can. in c. si gratios.* 5. *de rescr. in* vi.

XXII. Commeandi autem securitas ei, cui data est, debetur etiam extra territorium concedentis: quia datur contra

c. 19.] Adde l. locatio. 4. ff. *locati:* Cardinalem Tuschum pp. conclusion. 751. lit. p. Reinking. Lib. ii. classe ii. c. 8. num. 30.

XVIII. In like manner, goods of any kind are not comprehended in such a grant, but only such as you usually take on a journey.

XIX. If companions be expressed, those are not to be understood, whose case is more odious than the person himself to whom the grant is made. Such are pirates, robbers, deserters, refugees. The expression of the name of the nation of the companions permitted, shews sufficiently that the permission does not extend to others.

XX. The right of Safe Passage, since it proceeds from the force of power, in a dubious case is not extinguished by the death of the grantor; as we have said elsewhere of grants made by kings and other governors.

XXI. Disputes often arise on the point of grants made with the expression, *As long as I shall think proper.* And theirs is the sounder opinion, who hold that such a grant continues, even if a new act of willing do not intervene; because in a dubious case, that is presumed to continue to operate, which is necessary to the effect of right; but this is not so, when he who made the grant has ceased to be able to will, as happens by death. For the person being taken away, that presumption of duration falls to the ground along with it, as an accident ends with the substance.

XXII. Safe Passage implies safety beyond the territory of the

Lib. iii. 4. § 8. jus belli quod per se territorio non includitur: ut alibi a nobis dictum est.

XXIII. Captivorum redemtio multum habet favoris, Matt. xxv. 36, 39. maxime apud Christianos, quibus lex divina hoc misericordiæ genus peculiariter commendat. *Captivorum redemtio, mag-* Lib. vi. 12. *num atque præclarum justitiæ munus est:* verba sunt Lactantii. Ambrosio captivos redimere, maxime ab hoste bar- Lib. ii. *Off.* c. 15. baro, præcipua et summa liberalitas vocatur. Idem defendit *Ibid.* c. 28. suum et ecclesia factum, [p] quod vasa ecclesiæ etiam initiata confregerint, ut captivi redimerentur. *Ornatus,* inquit, *sacramentorum, redemtio captivorum est,* et multa alia in eandem sententiam.

XXIV. 1 Quibus adducor, ut non audeam indistincte probare leges illas, quæ captivos redimi vetant, quales apud Liv. xxii. 59. Romanos fuisse legimus: *nulli civitati viliores captivi quam nostræ,* ait in senatu Romano quidam. Eadem civitas Livio *Ibid.* dicitur minime in captivos jam inde antiquitus indulgens. iii. *Od.* 5. Nota est in hanc rem Horatii ode, ubi captivos redimere vocat

[p] *Quod vasa ecclesiæ etiam initiata confregerint, ut captivi redimerentur*] Imitatus hoc Ambrosii factum Augustinus, narrante Possidio, (*De Vit. Augustin.* cap. 24) qui contra carnalem sensum quorundam id factum dicit. Imitatus est et in eadem Africa episcopus Deogratias, narrante Victore Uticensi Lib. I. Vas, quod Remigii fuerat, datum ad redimendos a Nortmannis captivos narrat in Remigii *Vita Hincmarus.* Simile factum archiepi-

grantor, as well as within it: for it is given against the right of war, which is not limited to the territory; as we have elsewhere said.

XXIII. The Ransom of Prisoners is very favourably looked upon, especially among Christians, to whom the divine law especially commands this kind of mercy. *The Ransoming of Captives is a great and excelling office of justice,* are the words of Lactantius. So Ambrose. And he defends the act of himself and the Church in breaking up, even the consecrated vessels of the church, in order to redeem captives. *The ornament of the sacraments is the redeeming of captives;* and much to the same effect.

XXIV. 1 These considerations prevent me from approving, without distinction, of those laws which forbid the ransom of captives, as we learn that the old Roman laws did. *No city holds its captive citizens more cheap than we do,* says some one in the Roman Senate. And the city is called, by Livy, little indulgent to its captives, from early time. So Horace calls the ransom of captives a foul condition, and an example leading to evil, loss added to shame. But in fact, the blame which Aristotle casts upon the Lacedæmonian institution is

conditiones fœdas, et exemplum perniciem trahens: flagitio additum damnum. Sed quod Aristoteles in Laconum institutis reprehendit, idem in Romanorum culpari solet: nimis scilicet illa omnia directa ad res bellicas, quasi in illis solis salus civitatis consisteret. Atqui si rem humanitatis modo æstimamus, satius sæpe esset jus, quod bello petitur, amitti, [q]quam plurimos homines, et quidem cognatos aut populares, relinqui in gravissimis ærumnis. *Politic.* ii. 7; vii. 13.

2 Non videtur ergo lex talis justa, nisi appareat opus tali rigore, ut majora aut plura mala alioqui moraliter inevitabilia caveantur. Nam in tali necessitate, cum ipsi captivi ex caritatis lege suam sortem patienter ferre debeant, potest hoc eis injungi, et aliis, ne quid contra faciant, præcipi, secundum ea quæ de cive ob bonum publicum dedendo scripsimus alibi. Lib. ii. 25. § 3.

XXV. Non sunt quidem moribus nostris servi, qui bello capiuntur: non dubitem tamen, quin jus exigendi pretium redemtionis a capto possit ab eo, qui captum tenet, in alium transscribi: nam et incorporalia alienari natura patitur.

scopi Bremensis Rimberti laudat M. Adamus Bremensis *Ecclesiasticæ Historiæ* cap. 32. Probat hoc synodus universalis sexta, decreto relato in causam xii. quæstione 11. Quæ adjungenda his, quæ diximus supra hoc libro cap. v. § 2.

q *Quam plurimos homines, et quidem cognatos aut populares, relinqui in gravissimis ærumnis*] De Mauritii Imperatoris ob tale factum seria admodum pœnitentia vide Zonaram. (Lib. XIV. cap. 13. pag. 77, 78. *Ed. Reg.*)

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also ascribed to the Roman; that everything has reference to war, as if the safety of the state depended on that alone. But if we consider the interests of humanity, it would often be better that the right which is sought in war should be lost, than that a great number of men, our relations or fellow-countrymen, should be left in a condition of the deepest calamity.

2 Therefore such a law does not appear to be just, except it appear that there is need of such rigour, that more or greater evils, otherwise inevitable, may be averted. For in such a necessity, as the prisoners themselves should, by the law of charity, bear their lot patiently, so may this be enjoined them; and others may be directed not to do anything to the contrary; according to what we have elsewhere said of surrendering a citizen for the public good.

XXV. According to our habits, those taken in war do not become slaves: but I do not doubt that the right of exacting the amount of the ransom may be transferred, by the person who has the possession of the prisoner, to another person: for nature permits even incorporeal things to be alienated.

XXVI. Et potest idem pluribus debere pretium, si ab uno dimissus, pretio nondum soluto, captus sit ab alio: sunt enim diversa hæc debita ex diversis causis.

XXVII. Conventio de pretio facta rescindi non potest, eo quod captus intelligatur locupletior quam credebatur: quia jure gentium externo, de quo quærimus, nemo cogitur supplere quod in contractu minus æquo pretio promisit, si dolus non intercessit: ut intelligi potest ex his quæ de contractibus supra a nobis explicata sunt.

Lib. ii. 12. § 26.

XXVIII. Ex eo, quod diximus captivos nostros servos non esse, sequitur cessare illam acquisitionem universalem, quam accessionem esse dominii in personam diximus alibi. Non alia ergo captori acquirentur quam quæ specialiter apprehenderit: quare si quid clam secum habet captivus, non erit acquisitum, quia nec possessum. Sicut Paulus jurisconsultus contra Brutum et Manilium respondit, qui fundum possessione cepit, thesaurum, quem in fundo esse nesciat, non cepisse: quia qui nescit nequeat possidere. Cui consequens est, ut res eo modo celata ad redemtionis pretium solvendum prodesse possit, quasi retento dominio.

Lib. iii. 7. § 4.

L. possid. 3. *§ Nerat.* 3. *D. de acq. poss.*

XXVI. And the same person may owe the amount of ransom to more persons than one, if, when he has been let go by one, and the price is not yet paid, he is captured by another: for these are different debts from different causes.

XXVII. The agreement concerning the amount of ransom, cannot be rescinded on account of the prisoner being discovered to be richer than he was supposed to be; because, by the external Law of Nations, which is the subject of our present enquiry, no one is compelled to give more than he promised in a contract, at a price different from the current price, if there has been no deceit: as may be understood from what we have said about Contracts.

XXVIII. From what we have said, that prisoners with us are not slaves, it follows that there is an end of that acquisition of a right over all that belongs to the person, as well as the person; for that this is a mere accessory to the power over the person, we have elsewhere said. Therefore nothing else becomes the property of the captor, but what he specially takes possession of. And therefore, if the prisoner has anything secreted with him, that is not acquired by the captor, because it was never in his possession. So Paulus the jurist gave his opinion against Brutus and Manilius, that he who came into possession of a piece of land, did not acquire possession of a treasure which he did not know to be there; because not knowing of it, he

XXIX. 1 Quæri et hoc solet, an pretium conventum et ante mortem non solutum ab herede debeatur. Expedita mihi videtur responsio, si in carcere mortuus est, non deberi: promisso enim inerat conditio, si liberaretur: mortuus autem non liberatur. Contra, si mortuus est cum in libertate esset, deberi. Jam enim lucratus erat id, pro quo promissum erat pretium.

2 Plane fateor et aliter conveniri posse, ut ab ipso contractus momento pure debeatur pretium, et captivus tantum retineatur, non jam ut jure belli captus, sed ut a se oppigneratus: et contra pactum iniri posse, ut procedat pretii solutio, si die præstituto, qui captus sit, liber vivat. Sed hæc ut minus naturalia non præsumuntur acta, nisi manifestis documentis.

XXX. Proponitur et illud, an in carcerem redire debeat, qui dimissus est sub pacto, ut faceret dimitti alterum, qui factum morte prævenerit. Diximus alibi, factum tertii liberaliter promissum satis impleri, si nihil omittitur ex parte promissoris; at in onerosis obligari promissorem ad id, quod

Lib. ii. 11. § 22. et 15. § 16. *Hoc libro* c. 20. § 58.

could not be the possessor of it. From which it follows, that property so concealed may be applied to furnish the amount of ransom; the ownership having been retained by the prisoner.

XXIX. 1 This is also a frequent question: whether the ransom agreed upon, and not paid before death, be due from the heir. The answer appears to me to be obvious, if the prisoner die in captivity, that it is not due: for the promise was, on the condition that the prisoner should be liberated, and a dead man is not liberated. On the other hand, if he dies when he is at liberty, it is due; for he had already got the thing for which the price was promised.

2 I undoubtedly confess that the agreement may be made otherwise, so that, from the moment of the contract, the price may be absolutely due, and the prisoner may be retained, not now as a prisoner of war, but as a pledge given by himself: and on the other hand, that it may be covenanted that the payment of the price shall take place, if on a certain appointed day, he who is captive, be alive and free. But such conditions, as being less natural, are not to be presumed, except upon manifest evidence.

XXX. This question also is propounded: whether *he* ought to return into captivity, who was set free, on the compact that he should cause another to be liberated, who, by dying, prevented that being done. We have elsewhere said that the liberal promise of a third person is fulfilled with sufficient exactness, if nothing be omitted on

tantundem valet. Sic ergo in proposita quæstione non tenebitur quidem dimissus reddere se custodiæ: neque enim id conventum fuit, neque tacite actum intelligi patitur favor libertatis, neque debebit lucrifacere libertatem, [r] sed ejus, quod præstare non potest, æstimationem præstabit. Hoc enim naturali simplicitati congruentius, quam quæ in actione de præscriptis verbis et de condictione ob causam dati causa non secuta Romani juris interpretes tradunt.

L. natural. 5. § 1. de præs. verb. l. ult. D. de cond. ob caus. dati.

[r] *Sed ejus quod præstare non potest æstimationem præstabit*] Id non fecit Paulus Balionius ea lege dimissus ut Carvaialium restitueret libertati, qui Carvaialius, antequam liberaretur, mortuus fuit: quo nomine reprehendit Balionium Mariana libro XXX. (cap. 21.) Sed facti speciem paullo aliter narrat Paruta libro II.

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the part of the promiser; but that in onerous promises, the promiser is obliged to an equivalent. And therefore in the question proposed, the person liberated will not be bound to return himself into captivity; for that was not the agreement, and the favour which is to be shewn to liberty, does not allow us to suppose it tacitly understood; nor ought he to take his liberty, as a gain, without a consideration; but he must give the estimated value of the thing, which itself he cannot give. For this is more agreeable to the simplicity of nature, than the rules which the Roman jurists give, in speaking of an action on a promise made in formal terms; or a suit when a thing is given for a cause, and the cause does not follow.

CAPUT XXII.

DE FIDE MINORUM POTESTATUM IN BELLO.

I. INTER publicas conventiones [1] Ulpianus et hanc speciem posuit, *quoties inter se duces belli quædam paciscuntur.* Nos diximus post fidem datam a summis potestatibus, agendum et de ea, quam dant minores inter se, aut aliis: sive minores illi summis sint proximi, quales sunt duces excellenter dicti, de quibus illud Livii capiendum: *nec ducem novimus, nisi cujus auspicio bellum geritur:* sive longius remoti, quos sic distinguit Cæsar: *aliæ sunt legati partes, aliæ Imperatoris. Alter agere ad præscriptum, alter libere ad summam rerum consulere debet.*

L. convent. 5. D. de pact.

Lib. iv. 20.

Comm. iii. 51. *De Bell. Civ.*

[1] Vide celeberrimi et summi JCti Clar. Noodt eximium Librum *De Pactis et Transactionibus*, cap. 7. *J. B.*

Chapter XXII. *Of the Faith of subordinate Powers in a War.*

I. Among Public Conventions, Ulpian places this class: *When Generals make agreements.* We have said that, after faith is pledged by the supreme powers, we must consider that which the subordinate powers pledge to one another or to others: whether those subordinate powers are those nearest to the supreme, as Generals properly so called, (with regard to whom we must understand the expression of Livy, *We know no General except him who conducts the war;*) or those farther removed, of whom Cesar thus speaks, *A Brigadier has one duty, a General another; the former is to execute his orders; the latter to act freely with regard to the whole posture of affairs.*

II. Est autem in horum promissis duplex inspectio: nam aut hoc quæritur, an summam potestatem obligent, aut an se ipsos. [a]Prior quæstio definienda est ex eo, quod alibi diximus, obligari nos et per eum quem voluntatis nostræ ministrum elegerimus, sive voluntas illa specialiter expressa est, sive ex ipsa præpositionis natura colligitur. Nam qui dat facultatem, dat quantum in se est quæ ad facultatem sunt necessaria, quod in materia morali intelligendum est morali modo. Duobus ergo modis potestates minores supremam suo facto obstringunt, faciendo id quod probabiliter ipsorum officio contineri censetur, aut etiam extra illud ex speciali præpositione nota publice, aut iis quorum res agitur.

Lib. ii. 11. § 12.

III. Sunt et alii modo, quibus potestas summa obligatur antecedente ministrorum facto, sed non ita, ut id factum causa sit proprie dicta, sed ut occasio sit obligationis: idque dupliciter, vel per consensum, vel per rem ipsam. Consensus apparet ratihabitione, non tantum expressa, sed et tacita, id est, ubi scivit summa potestas quod actum erat, et fieri passa est, quæ ad aliam causam referri probabiliter non possunt; quod

[a] *Prior quæstio definienda est ex eo, quod alibi diximus*] Vide Camdenum in anno cIↃ IↃ xciv. in pronuntiato Comitis Mirandæ in causa Haukinsi. (Pag. 630.)

II. The promises of Officers of this kind give rise to two kinds of considerations: Whether they bind the supreme authority; and whether they bind themselves. The former question is to be decided by what we have said; that we are bound by his acts whom we have selected as the minister of our will, whether that will be specially expressed, or be collected from the nature of the command committed to him. For he who gives the means of acting, gives, as far as depends on him, the means which are necessary to such action: which, in moral matters, is to be understood in a moral manner. Therefore there are two ways in which subordinate authorities bind the supreme authority by their acts: either by doing that which, on probable grounds is conceived to be included in their office; or beyond that, committed to them by some special assignment of authority, known to those whose interests are dealt with.

III. There are also other ways in which the supreme authority is bound, in virtue of an antecedent act of its ministers, but so that that act is not, properly speaking, the cause of the obligation, but the occasion; and that, in two ways; either by consent of the superior, or by the thing itself. Consent appears by sanction of the act; not express only, but tacit also; that is, when the supreme authority knew

ipsum quomodo procedat, alibi tractavimus. Per rem hactenus obligantur, ne locupletiores fiant aliena jactura, id est, ut aut contractum præstent ex quo commodum volunt consequi, aut de commodo discedant: de qua æquitate itidem a nobis alibi dictum est. Et hactenus nec ultra recipi potest, quod dicitur valere, si quid utiliter gestum est. Contra vero ab injustitia excusari non possunt, qui, cum pacta improbent, tamen retinent quod sine pactis non haberent: ut cum senatus Romanus, narrante Valerio, factum Cn. Domitii neque probare potuit, neque rescindere voluit: qualia multa in historiis occurrunt.

Lib. ii. 4. § 5. et 15. § 17.

Lib. ii. 10. § 2.

Lib. ix. 6. n. 3.

IV. 1 Illud quoque ex supra a nobis dictis repetendum est, obligari eum qui præposuit, etiam si præpositus fecit contra mandata arcana, intra limites tamen publicæ functionis. Hanc æquitatem recte secutus est prætor Romanus in institoria actione: neque enim omne, quod cum institore geritur, obligat eum, qui præposuit, sed ita, si ejus rei gratia cui præpositus fuerit contractum est: de quo autem palam proscriptum fuit, ne cum eo contrahatur, is præpositi loco non habe-

Lib. ii. 11. § 12. et 13.

L. cuicumq. 5. § non tamen. 11. D. de inst. act. l. sed st. 11. § de quo 2. et § proscrib. 3. et § proscript. 4. eod. tit.

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what was done, and allowed it to be done; and in this case, if no other reason [besides consent] can be probably assigned, we have elsewhere stated what course the matter must take. The superior authority are obliged by the thing itself to this extent; that they are not to be made better off by the loss of other persons; that is, that they are either to fulfil the contract by which they wish to obtain an advantage, or are to give up the advantage; a case of equity which we have elsewhere discussed. And so far, and no further, acts which are performed so as to bring utility to us, are to be said to be *valid*. On the other hand, they cannot be excused from the charge of injustice, who, while they condemn the compact, retain that which without the compact they would not have: as when the Roman Senate neither could approve the act of Cn. Domitius, nor would rescind it: of which kind of occurrence we have many in history.

IV. 1 We must also repeat what we have said before, that he who placed a person in a command, is bound, even though the person so placed acts against secret orders; at least, within the limits of his public function. This rule of equity was rightly followed by the Roman Prætor, in the action against an Agent; for it is not everything done by the Agent which obliges the Principal, but such things only as are contracted in the matter for which his agency was employed; but he concerning whom public notice was given, that contracts with him would not be held good by the Principal, does not stand in the place

bitur: quod si proscriptum quidem sit, sed non pateat, tenetur qui præposuit: conditio quoque præpositionis servanda est: nam si quis sub certa lege vel interventu cujusdam personæ contrahi voluit, æquissimum erit id servari, in quo præpositus est.

2 Cui consequens est, ut alii reges aut populi magis, alii minus ex ducum suorum contractibus teneri possint, si satis notæ sint ipsorum leges atque instituta. De his si non constat, sequendum est quod conjectura dictat, ut concessum intelligatur id, sine quo satis commode, quæ officii sunt, expediri non possunt.

3 Mandati fines si excesserit minor potestas, tenebitur ipsa, si quod promisit præstare non potest, ad æstimationem: nisi lex aliqua satis cognita id quoque impediat. Quod si dolus accesserit, id est, si præ se tulerit jus majus quam habebat, jam tenebitur et de damno culpa dato, imo et ex crimine ad pœnam crimini respondentem. Ex priore causa bona obligantur, et si ea deficiant operæ, aut libertas corporis: ex posteriore quoque persona, aut bona, aut utrumque, pro de-

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of the Principal. But if notice were given, and were not publicly known, the Principal is bound. Also the condition of the agency is to be observed; for if the Principal directed the contract to be made on certain rules, or by the intervention of a certain person, it is just that the contract should be valid on these conditions.

2 From which it follows, that some kings and peoples may be more, and others less bound, by the contracts of their generals, if their laws and rules are sufficiently known. If these are not commonly known, the interpretation must be followed which conjecture dictates; in such a way that that is understood to be conceded without which the functions which belong to a person's duty cannot be conveniently carried out.

3 If a subordinate authority has exceeded the bounds of his commission, he will be bound, if he cannot perform what it has promised, to an estimated equivalent: except some law sufficiently known prevent that also. But if deceit be added, that is, if he pretended to an authority greater than he had, he will then be bound, both for the damage done by his fault, and as a criminal, to the penalty corresponding to his guilt. On the first ground, his goods are liable, and if they are insufficient, his labour, or his personal liberty: on the second ground, his person also is liable, or his goods, or both, according to the quantity of the transgression. What we have said of deceit, will hold, even if the person so acting made an attestation that he did not intend himself to bear the obligation; because the debt due for

licti quantitate. Quod autem de dolo diximus procedet etiam, si quis testationem interposuerit semetipsum obligari nolle, quia et damni dati et pœnæ justæ debitum cum delicto non voluntario sed naturali nexu cohærent.

V. Quia vero semper aut summa potestas obligatur, aut minister ejus, ideo et certum est partem alteram obligari, nec dici posse claudicare contractum. Egimus de comparatione eorum, qui medii sunt, ad superiores.

VI. Videamus et quid in inferiores possint. Nec puto dubitandum, quin dux milites, magistratus oppidanos obligent intra eos actus qui solent ab ipsis imperari: alioqui consensu opus esset. Contra, ducis aut magistratus pactum inferioribus proderit in mere utilibus omnino: id enim in potestate comprehensum satis est: in his quæ onus annexum habent, intra ea quæ imperari solent, omnino; extra ea, ita si acceptaverint, quæ congruunt his quæ de stipulatione pro tertio ex naturali jure alibi disseruimus. Generalia hæc illustriora facient subjectæ species.

Alc. viii. *cons.* 40.

Lib. ii. 11. § 14.

VII. [b]De belli causis et consequentibus transigere ad

[b] *De belli causis et consequentibus transigere ad belli ducem non pertinet*] Belisarius *Gotthis: οὐ γάρ ἐσμεν κύριοι τὰ βασιλέως πράγματα διοικῆσαι· neque enim nos jus habemus ordinandi res Imperatoris.* [Apud PROCOPIUM, *Gotthic.* Lib. II. c. 6.]

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the damage, and the penalty due for the crime, are connected therewith, not by a voluntary, but by a natural tie.

V. And since, in all cases, either the supreme power is bound, or its minister, it is therefore certain that the other party is bound also: nor can it be alleged that the contract is one-sided.

We have considered the relation of subordinates to superiors; let us now see what power they have over inferiors.

VI. I have no doubt, that a General can bind soldiers, and a Magistrate, citizens, within the limits of those acts which are customarily done at their command: in other cases, consent is necessary. On the other side, the compact of a general or magistrate will give advantages to their inferiors absolutely, in things simply useful; for that was sufficiently comprehended in their power: also in those things which have an *onus* annexed to the utility, within the limits of their customary command, absolutely: and out of those limits, if they accept the compact; which agrees with what we have delivered concerning stipulations for a third party on grounds of Natural Law. These general principles will become plainer by examining specific cases.

VII. To negociate concerning the causes and consequences of the

belli ducem non pertinet, neque enim belli gerendi pars est bellum finire: imo etsi cum maxima potestate præpositus fuerit, ea de belli ductu erit intelligenda. Agesilai responsum ad Persas fuit εἰρήνης τὴν πόλιν εἶναι κύριον· *de pace constituendi jus esse civitati. Quam pacem A. Albinus cum Jugurtha rege Senatus injussu fecerat, Senatus rescidit*, [2]inquit Sallustius. Et apud Livium est: *qui rata ista pax erit, quam non ex auctoritate senatus, non jussu populi Romani peregerimus?* Sic Caudina, sic Numantina sponsio populum Romanum, ut alibi exposuimus, non obligavit. Et eatenus verum est illud Posthumii, *si quid est in quo obligari populus potest, in omnia potest*, nempe eorum quæ ad ductum belli non pertinent: quod ostendunt antecedentia, de deditione, de sponsione relinquendæ aut incendendæ urbis, de statu mutando.

Plut. *in Ages.* p. 601 B.

Bell. Jug. Lib. xxxvii. 19.

Lib. ii. 15. §§ 16, 17.

VIII. [c]Inducias dare ducum est, nec summorum tantum, sed et minorum, iis nempe, quos oppugnant aut obsessos tenent, et se suasque copias quod attinet. Nam alios duces

[2] Non sunt hæc ipsa verba SALLUSTII, apud quem ita legitur: *Senatus ita, uti par fuerat, decernit, suo atque Populi injussu, nullum potuisse fœdus fieri. Bell. Jug.* cap. 43. *Ed. Wass. J. B.*

[c] *Inducias dare ducum est*] Vide Parutam Lib. v.

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war, does not belong to the general of the army; for it is not a part of the conduct of the war, to end the war. Even if he be appointed to the command with the greatest powers, those are to be understood as relating to the conduct of the war. The answer of Agesilaus to the Persians was, that, *To make peace was a matter for the State.* Sallust says, *The peace which A. Albinus had made with Jugurtha, without the authority of the Senate, the Senate rescinded.* And in Livy: *How can that peace be valid which we have made without the authority of the Senate, and the command of the Roman People?* So the convention of Caudæ, so that of Numantia, did not bind the Roman People, as we have elsewhere explained. And so far that dictum of Posthumius is true, *If the people can be bound to anything, it can be bound to everything;* that is, of those things which do not pertain to the conduct of the war: for that this is the application of the words, is shewn by what precedes; of surrender; of engagements with regard to giving up or burning a city; of change of the state.

VIII. To grant a Truce, is the business of a general; and not only of the supreme general, but also of subordinate ones; namely, to those whom they besiege or blockade, as far as concerns themselves and their forces. For such truces do not bind other generals

pares non obligant, quod Fabii et Marcelli historia apud Livium declarat. Lib. xxiv. 19.

IX. 1 Homines, imperia, agros, bello quæsita concedere itidem ducum non est. Hoc jure Syria Tigrani ademta, Just. xl. 2. quamquam Lucullus dederat. De Sophonisba, quæ bello capta Liv. xxx. 14. erat, ait Scipio, Senatus populique Romani judicium atque arbitrium esse; ideo a Masinissa, quo duce capta erat, libertatem ei dari non potuisse. In res alias, quæ in præda sunt, Cast. *de just. et jure*. Lib. i. jus aliquod concedi imperantibus videmus, non tam ex vi potestatis, quam cujusque populi moribus: qua de re satis superius a nobis dictum est. Lib. iii. 6. § 15.

2 At nondum quæsita condonare omnino in ducum est potestate: quia oppida pleraque et homines sæpe in bello dedunt se sub conditionibus vitæ salvæ, aut et libertatis, aut et bonorum, de quibus summæ potestatis arbitrium exquiri res plerumque non patitur. Pari ratione jus hoc et ducibus non summis dandum est intra ea, quæ ipsis agenda commissa sunt. Maharbal Romanis quibusdam, qui ex prælio ad Trasimenum evaserant, satis longe absente Annibale, fidem dederat non tantum vitæ, τῆς σωτηρίας, ut nimium concise narrat Poly-

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of equal authority; as the history of Fabius and Marcellus in Livy declares.

IX. 1 In the same way, it is not the business of generals to give up men, conquests, lands, obtained in war. By this rule, Syria was taken from Tigranes, though Lucullus had given it to him. Of Sophonisba, who had been taken prisoner in war, Scipio says that the judgment and decision of the Senate and People of Rome was to determine; and that therefore Masinissa, though the general by whom she was taken, could not give her liberty. That over other things which are taken as prize of war, a certain disposal is conceded to persons in authority, we have seen; not so much from the force of their power, as from the customs of each people: on which subject we have already spoken sufficiently.

2 It is however in the power of generals to grant the possession of things not yet acquired: because towns sometimes and men often surrender themselves in war, on condition of lives being spared, or liberty, or property; among which concessions generally, the state of things does not allow the decision of the supreme authority to be asked. And by parity of reason, this right is also given to commanders who are not the highest, within the limits of the matters which are committed to them to execute. Maharbal had given to some Romans who had escaped from the battle at Trasimenum, Annibal being absent

Lib. iii. 84. bius, sed, si arma tradidissent, abire cum singulis vestimentis Ibid. c. 85. passurum: retinet eos Annibal hoc causatus: ὅτι Μααρβὰς οὐκ εἴη κύριος ἄνευ τῆς αὐτοῦ γνώμης, διδοὺς τὴν ἀσφάλειαν τοῖς ὑποσπόνδοις· [d] *in potestate Maharbalis non fuisse, se inconsulto fidem dare se dedentibus, quæ ipsos illæsos aut* Lib. xxii. 6. *indemnes præstaret.* Judicium de hoc facto Livii sequitur. *Punica religione servata fides ab Annibale est.*

3 Quare et M. Tullium in Rabirii causa ut oratorem audire debemus, non ut judicem. Vult a Rabirio Saturnium jure cæsum, quem consul C. Marius data fide ex capitolio Orat. pro C. Rab. c. 10. abduxerat. *Fides,* ait, *qui potuit sine senatus consulto dari?* et ita rem agit quasi Marium solum fides ista obstringeret. Atqui C. Marius ex senatusconsulto potestatem acceperat operam dandi, ut imperium populi Romani majestasque conservaretur. [e] In ea potestate, quæ Romanis moribus erat maxima,

[d] *In potestate Maharbalis non fuisse, se inconsulto fidem dare se dedentibus*] Non magis probabile erat in re simili effugium, quo usus Bajazetes adversus Servios Cratovianos, narrante Leunclavio Lib. VI.

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for so long a time as to leave room for this, not only his pledge for their lives, but, if they gave up their arms, the liberty of departing each with a single suit of apparel. But Annibal retained them, alleging that *it was not in the power of Maharbal to pledge himself, without consulting him, to those who surrendered, that they should be free from harm and penalty.* The judgment of Livy respecting this act follows: *This pledge was observed by Annibal with Punic faith.*

3 And therefore we must take what Cicero says, in the case of Rabirius, as coming from an advocate, not a judge. He maintains that Saturninus was lawfully put to death by Rabirius, having been drawn from the Capitol by C. Marius on his faith given. *How,* he says, *could faith be given without a decree of the Senate?* And he reasons as if Marius alone were bound by such a pledge. But C. Marius had received from the Senate the commission of acting so as to preserve the empire and the majesty of the Roman people: and in that power, which was the highest, according to Roman custom, who can deny that there was comprehended the right of granting impunity, if in that way all peril might be averted from the commonwealth?

X. But in these pacts of generals, because they act concerning the affairs of others, so far as the nature of contracts allows, the interpretation is to be limited; namely, so that the supreme power is not bound by their act more than it intended, and so that they do not suffer damage by undertaking their office.

XI. And thus he who is admitted to a pure surrender by the

quis neget comprehensum jus dandæ impunitatis, si eo modo omne periculum a republica arceretur?

X. Ceterum in his ducum pactis, quia de re agunt aliena, quatenus contractus natura patitur, adstringenda interpretatio, nempe ne aut ex ipsorum facto summa potestas plus quam vellet obligetur, aut ipsi damnum subeant officium faciendo.

XI. Ita qui in deditionem puram a duce accipitur, eo jure acceptus censetur, ut de eo victoris populi aut regis arbitrium sit, cujus exemplum est in Gentio Illyrii, et Perseo Macedoniæ rege, qui se, ille Anicio, hic Paulo dediderunt. App. *Bell. Illyr.* p. 761 Liv. xlv. 6.

XII. Sic adjecta cautio, *ita ratum sit, si populus Romanus censuisset,* quam sæpe in sponsionibus invenias, efficiet, ut, ratihabitione non secuta, dux in nihil ipse teneatur, nisi si qua locupletior factus sit.

XIII. Et, qui oppidum tradere promiserunt, possunt præsidium dimittere, ut fecisse Locrenses legimus. Liv. xxiv. 1.

[e] *In ea potestate, quæ Romanis moribus erat maxima*] Vide Sallustium *in Bello Catilinario.* (Cap. 30. *Ed. Wass.*) Tullianæ huic cavillationi non dispar illa Consalvi in ducem Valentinum Guicciardini libro VI. (Pag. 339. *Ed. Genev.* 1645.)

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general, is understood to be accepted on the condition that the victorious people or king is to determine his fate: of which examples are to be found in Gentius the Illyrian, and Perseus the Macedonian, of whom the former surrendered himself to Anicius, and the latter to Paulus.

XII. The condition added, *This to be valid if the Roman People so judge,* which you often find in conventions, will produce the effect, that if that sanction do not follow, the general is held to nothing, except so far as he is himself bettered by the transaction.

XIII. Also they who have promised to give up a town may dismiss the garrison; as we read that the Locrians did.

CAPUT XXIII.

DE FIDE PRIVATA IN BELLO.

De Offic. i. 13. I. CICERONIS est illud satis tritum: *etiam si quid singuli temporibus adducti hosti promiserint, est in eo ipso fides conservanda:* singuli, milites puta aut pagani: nihil enim ad fidem refert. Mirum est inventos esse juris

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CHAPTER XXIII. *Of Private Faith in War.*

I. The dictum of Cicero is sufficiently well known;—*Even if individuals under the pressure of the time have promised anything to the enemy, faith also is to be observed in that: individuals* meaning either solders or civilians: for it makes no difference which they be, as to the obligation of good faith. It is strange that there should have been found masters of law who taught that pacts made publicly with enemies, bind us to good faith; but that those which are made by private persons, do not. For since private persons have private rights which they can subject to obligation, and since enemies are capable of acquiring rights, what can there be to impede the obligation? Add, that except we establish this rule, there is given occasion of bloodshed, and impediment to liberty; for if the faith of private persons be removed, the former can often not be prevented, nor the latter obtained by prisoners.

II. Indeed, not only is our word binding when given to an enemy

magistros, qui docerent, pacta publice cum hostibus inita fidem adstringere; at quæ a privatis fierent, non item. Nam, cum privati jura privata habeant quæ obligare possunt, et hostes capaces sint acquirendi juris, quid esse potest quod obligationem impediat? adde quod nisi id statuatur, datur cædibus occasio, libertati impedimentum: nam et illæ caveri sæpe, et hæc obtineri a captivis, fide privatorum sublata, non poterit.

Bart. *in l. convent. D. de pactis.* Zasi. *in apol. cont. Eckium.* *Hoc libro,* c. 19. § 2.

II. Imo non hosti tantum illi, quem jus gentium agnoscit, sed et latroni et piratæ data privatim fides obligat, perinde ut de fide publica supra diximus. Id interest, quod si metus injustus ab altero incussus impulerit ad promittendum, is qui promisit petere restitutionem, aut, si alter nolit, sibi eam præstare potest. Quod in metu procedente ex bello publico juris gentium locum non habet. Quod si et jusjurandum accesserit, jam omnino quod promissum est præstandum erit ab eo qui promisit, si perjurii crimen effugere volet. Sed tale perjurium si in hostem publicum commissum sit, puniri ab hominibus solet: si in latrones aut piratas, dissimulari odio eorum, quorum commodum agitur.

Supra, ii. 11. § 7. et iii. 19. § 5.

Oldr. *cons.* 7. Covar. *de matrim.* p. 11. c. 3. § 4. n. 21.

III. In hac quoque privata fide minorem non excipiemus, qui ejus status est, ut actum intelligat. Nam quæ minoribus consulunt beneficia, ex jure sunt civili. Nos de jure gentium quærimus.

IV. Et de errore alibi diximus, ita jus dare a contractu

Lib. ii. 11. § 6.

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whom the Law of Nations acknowledges as such, but even to a robber or a pirate; as we have said above, in speaking of public faith. There is this difference, that if an unjust fear, impressed by another, has been the force impelling to the promise, he who made the promise may seek restitution; or if the other will not give it, may take it by his own power. This does not hold in the case of fear proceeding from a war public according to the Law of Nations. But if an oath be added, he who promised must by all means perform what he has promised, if he wishes to escape the crime of perjury. Yet such a perjury, if committed towards an enemy, is commonly punished by men; if it be committed against robbers or pirates, it is commonly overlooked, in consequence of the hatred borne to such persons.

III. In this case of private faith we do not except a Minor, who is in such a condition that he understands the act. For the allowances which are made to minors are made by the Civil Law. And we are now considering the results of the Law of Nations.

IV. With regard to Error, we have elsewhere said that there is a right of receding from a contract, if that which was by error given in

recedendi, si id, quod per errorem creditum fuit, in mente agentis vim habuerit conditionis.

V. 1 At, quo usque se extendat privatorum in paciscendo potestas, difficilior inspectio est. Quod publicum est, a privato alienari non posse satis constat: nam si ne ducibus
Cap. xxii. § 7. quidem belli id permissum est, ut modo probavimus, multo minus privatis. Sed de ipsorum actionibus ac rebus quæri potest, quia videntur hæc quoque concedi hostibus non posse sine aliquo damno partis: unde videri possunt talia pacta illicita cum civibus ob jus supereminens civitatis, tum conductis militibus ob fidem sacramento datam.

2 Sed sciendum est, ea pacta, quæ malum majus aut certius evitant, magis utilia quam damnosa etiam publico censeri debere, quia minus malum induit rationem boni: χρὴ τῶν κακῶν ἐπιλέγεσθαι τὰ μετριώτερα, ut ait quidam apud
Punic. p. 55. Appianum. Neque vero fides sola, qua quis potestatem ipsam sui et suarum rerum non abdicat, neque utilitas publica sine legis auctoritate id efficere possunt, ut quod factum est, etiamsi contra officium factum esse detur, irritum sit et effectu juris omni careat.

3 Lex quidem posset adimere subditis aut perpetuis, aut

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trust have, in the mind of him who entrusted it, the force of a condition.

V. 1 How far the power of private persons, to make agreements, extends, is a more difficult question. That what is public property cannot be alienated by a private person, is sufficiently plain: for if that was not even permitted to generals, as we have proved just now, much less is it to private persons. But it may be questioned concerning their own actions and property; because it may seem that these also cannot be conceded to the enemy without some damage of the party: whence it may seem that such pacts with the enemy are unlawful for citizens, on account of the eminent jurisdiction of the state; and for regular soldiers, on account of their military oath.

2 But it is to be considered that those pacts which are made in order to avoid a greater or certain evil, ought to be reckoned more useful than hurtful to the public also; because the lesser evil assumes the nature of a good. Nor does fidelity to the state or his superior; since by this the person does not abdicate his power over himself and his property; nor does the public utility alone, without the authority of law; produce such an effect, that what is done, even if it be done against duty, shall be void and destitute of jural effect.

3 Law indeed may take from subjects, either perpetual or tem-

temporariis hanc potestatem: sed neque lex hoc semper facit; parcit enim civibus: neque semper facere potest: nam leges humanæ, ut alibi diximus, vim obligandi tum demum habent, si latæ sint ad humanum modum, non si onus injungant, quod a ratione et natura plane abhorreat. Et ideo leges et præcepta specialia, quæ tale quid aperte præ se ferunt, pro legibus haberi non debent; generales autem leges interpretatione benigna ita accipiendæ sunt, ut casus summæ necessitatis excludant.

Lib. i. 4. § 7. n. 2, 3; ii. 14. § 12. n. 2.

4 Quod si actus, qui lege aut præcepto interdictus erat, et valere vetitus, interdici æquo jure potuit, jam irritus erit actus privati, sed puniri tamen idem poterit, ideo quod promisit id, quod sui juris non erat, maxime si juratus id fecerit.

VI. Promissio captivi de redeundo in carcerem merito toleratur: neque enim deteriorem reddit captivi conditionem. Non ergo, ut quidam existimant, gloriose tantum fecit M. Attilius Regulus, sed et quod debebat: *Regulus*, inquit Cicero, *non debuit conditiones pactionesque bellicas et hostiles perturbare perjurio.* Nec obstat illud:

Offic. iii. 29.

Horat. iii. Od. v. 49.

Atqui sciebat, quæ sibi barbarus
Tortor pararet.

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porary, their power: but the law does not always do this; for it is tender of the interests of citizens. For human laws, as we have elsewhere said, have then, and then only, a binding force, if they are made in a humane manner, not if they impose burthens which are repugnant to reason and nature. And therefore special laws and precepts which have, upon the face of them, anything of this kind, are not to be held as laws: and general laws are to be interpreted indulgently, so as to exclude cases of extreme necessity.

4 If an act, which was interdicted by a law or precept, and deprived of its validity by prohibition, could be interdicted with reasonable right, the act of the private person will be void; but at the same time he is liable to punishment for having promised what was not in his power, and especially if he did it under oath.

VI. The promise of a prisoner to return into captivity is rightly allowed: for it does not render the condition of the prisoner worse than it was. And therefore Regulus, in doing what he did, acted not gloriously only, as some think, but also as he ought. *Regulus*, says Cicero, *ought not to disturb the conditions and covenants belonging to the laws of war, by an act of perjury.* Nor is it a sound objection, that, as Horace says, he knew the tortures which awaited him: for when he gave the promise he knew how likely this was. And so with regard

Nam et hoc fieri posse jam scierat, cum promitteret. Sic et de decem captivis, ut quidem ex antiquis scriptoribus rem nar- Lib. vii. 18. rat Gellius, *octo postliminium justum non esse sibi responderunt, quoniam* [a]*dejurio vincti forent.*

VII. 1 Solent et promittere quidam ne in certum locum redeant, ne adversus eum, qui ipsos in potestate habet, mili- Lib. i. 103. tent. Prioris exemplum apud Thucydidem, ubi sic Ithomenses promittunt Lacedæmoniis, exituros se Peloponneso, nec unquam redituros. Posterius nunc frequens est. Vetus ex- Lib. i. 78. emplum est apud Polybium, ubi dimittuntur ab Amilcare Numidæ sub lege, *μηδένα φέρειν ὅπλον πολέμιον κατ' αὐτῶν· ne adversus Carthaginienses eorum quisquam arma* Goth. iii. 36. *hostilia ferret.* Simile pactum habet in Gothicis [b]Procopius.

2 Hoc pactum quidam irritum pronuntiant, quia sit contra officium, quod patriæ debeatur. At non, quicquid contra officium est, statim et irritum est, ut et alibi et supra diximus. Deinde vero ne contra officium quidem, libertatem sibi parere id promittendo, quod jam est in hostis manu. Nihilo enim

[a] *Dejurio vincti*] Id est, capitis minores, ut Horatius de Regulo loquitur. (Dict. III. *Od.* v.)

[b] *Procopius*] *Gotth.* II. de Herulis. (Cap. 14.) [Hoc exemplum diversum est ab eo, quod in contextu indicatur. In loco præcedenti Polybii nullum est pactum, sed comminatio tantum Hamil-

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to the ten prisoners, as Gellius tells the story out of old authors; *Eight said that they had no right to postliminium, for they had by their oaths lost the character of citizens.*

VII. 1 Also prisoners often promise not to return to a certain place, or not to bear arms against him who has them in his power. We have an example of the former case in Thucydides; when the Ithomians promise the Lacedæmonians that they will quit Peloponnesus, and never return. The latter kind of engagement is now common. We have an old example in Polybius, when the Numidians are dismissed by Amilcar, on condition of never bearing arms against the Carthaginians. Procopius in his Gothic history has a similar pact.

2 Some moralists pronounce this pact void, because it is against the duty which a person owes to his country. But what is against duty, is not necessarily and of course void; as we have already explained. And in the next place, it is not against duty to obtain one's liberty by promising that which is already in the enemy's power. For the cause of the country is not worsened by such an act; for he who is a captive has ceased to be of any value to that cause.

VIII. Also some promise not to make their escape. They are bound by this promise, even though they were under restraint when

deterior fit patriæ causa, cui is, qui captus est, ni liberetur, jam periisse censendus est.

VIII. Promittunt et nonnulli non fugere: tenet hoc eos, etiamsi vincti promiserint, contra quam quidam sentiunt. Nam et sic solet aut vita servari, aut mitior obtineri custodia. Si vero vinctus sit postea, ita demum liber erit, si ideo promiserit, ne vinciretur.

IX. Satis inepte quæritur, an, qui captus est, alii dedere se possit. Nimis enim certum est, neminem sua pactione jus alteri quæsitum adimere posse. Est autem captori jus quæsitum, aut ipso belli jure, aut partim belli jure, partim concessu ejus qui bellum gerit, secundum ea quæ supra expo- Lib. iii. 6. § 23, *et seqq.*
suimus.

X. Circa effectus pactorum egregia quæstio est, an privati, si in fide præstanda negligentes sint, a suis potestatibus cogendi sint eam implere. Et cogendos verius est in bello duntaxat solenni, ob jus gentium, quo bellum gerentes obstringuntur alter alteri jus reddere, etiam de factis privatorum, ut puta si a privatis violati essent hostium legati. Sic Cornelius Nepos, recitante Gellio, scripserat multis [c] in senatu placuisse, *Noct. Att.* vii. 18.

caris. *J. B.*]

[c] *In senatu placuisse*] Idem jam ante senatus redire eos coegerat, quos Pyrrhus sub conditione dimiserat. Appianus *Exc. Legat.* num. 6. (Pag. 348. *Excerpt. Fulv. Ursin.*)

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they promised; contrary to the opinion of some moralists. For in this way, men's lives are saved, and their captivity made less harsh. If, however, a person, having made such a promise, is afterwards put in chains, he will be liberated from his promise, if he made it to avoid being put in chains.

IX. A question is raised, idly enough, whether he who is captured can surrender himself to another than the captor. For it is abundantly certain that no one can by a compact of his take away a right from another. And the captor has already acquired a right, either by the right of war, or partly by the right of war, partly by the concession of the superior authority which makes the war; as we have explained above.

X. With regard to the effects of compacts, there is a noted question, whether private persons, if they are negligent in fulfilling their engagements, can be compelled by their own authorities. And the sounder opinion is, that they are compellable only in a regular war, on account of the Law of Nations, by which the belligerents are bound to fulfil the rules of justice to each other, even with regard to the acts of private persons; as for instance, if ambassadors had been

ut ii de decem captivis, qui redire nollent, datis custodibus ad Hannibalem deducerentur.

Lib. ii. 16. § 2. Hoc lib. c. 20. § 26.

XI. De interpretatione tenendæ regulæ jam aliquoties memoratæ, ut a proprietate verborum non recedatur, nisi absurdi vitandi causa, aut ex alia satis certa mentis conjectura: ut in dubio magis interpretemur verba contra eum, qui legem dedit.

XII. Vitam pactus non etiam ad libertatem jus habet. Vestium nomine arma non veniunt: sunt enim hæc diversa. Venisse auxilium recte dicitur si sit in conspectu, etiamsi nihil agat: nam ipsa præsentia suam vim habet.

XIII. At rediisse ad hostem non dicetur qui clam rediit ut statim exiret: rediisse enim ita intelligendi debet, ut in potestate hostium iterum sit. Contraria interpretatio veteratoria Ciceroni, stulte callida, quæ fraudem in se et perjurium

De Off. iii. 32.

[d] *Justa auxilia in pactis deditionis*] Sunt ejus pacti exempla quatuor in III. *Gotthicorum* Procopii. (Cap. 7. 12. 30. 37.) Aliud de Luca apud Agathiam

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violated by private persons. So Cornelius Nepos, as Gellius informs us, had written, that many of the senators were of opinion, that those of the ten captives who were unwilling to return, should be sent to Hannibal under guard.

XI. With regard to Interpretation, the rules are to be observed in this case also, which we have several times mentioned; that we are not to recede from the propriety of the words, except in order to avoid an absurdity, or for some other good probable reason: that in a doubtful case we are rather to interpret the words against him who gave the law: and the like.

XII. He who has covenanted for his life, has not a right to his liberty also. Under the name of clothes, arms are not included: for they are different in kind. Aid is said to have arrived, if it be in sight, though it be doing nothing; for the presence of it has an efficacy.

XIII. But he cannot be said to have returned to the enemy according to his promise, who returned secretly in order to go away again immediately: for he was to be understood to mean by *return*, that he was again to be in the power of the enemy. The contrary quibbling interpretation is called by Cicero silly cunning, involving fraud and perjury. And this interpretation is called by Gellius a fraudulent cunning; and those who had employed it were noted as ignominious by the censor, and made incapable of giving evidence, and disreputable.

XIV. When an agreement is made for surrendering a city except

habeat. Eadem Gellio fraudulenta calliditas, a Censore ignominiis notata, qui eam adhibuerant, intestabiles et invisi. Lib. vii. 18.

XIV. [d]Justa auxilia in pactis deditionis non faciendæ, si ea advenerint, intelligi debent talia quæ periculum cessare faciant.

XV. Notandum et hoc, si quid de executionis modo convenit, id conditionem non injicere pacto, ut si dictum certo loco solvi, qui locus postea dominum mutaverit.

XVI. De obsidibus tenendum quod supra diximus, plerumque eos accessionem esse principalis actus: sed tamen conveniri etiam posse ut disjunctiva sit obligatio, nimirum ut aut fiat aliquid, aut obsides retineantur. Sed in dubio tenendum est illud, quod maxime est naturale, id est, ut accessio tantum credantur. *Hoc lib.* c. 20. § 58.

Lib. I. (c. 7.) De Castello Corsicæ apud Bizarum *Historiæ Genuensis* x. alia libro XVIII. et in bello in Mauros. Habet tale et Cromerus Lib. XI.

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proper aid arrive, such aid is to be understood as makes the danger cease.

XV. This also is to be noted, that if any covenant is made as to the mode of executing the convention, that does not become a condition of the agreement: as, if it were said that it is to be discharged in a certain place, which place afterwards changes its master.

XVI. With regard to Hostages, what we have said above is to be observed, that in general, they are accessories to the principal act: but it may be covenanted that the obligation shall be disjunctive; that either something shall be done, or the hostages retained. But in a doubtful case, we must hold to the most natural supposition, that they are only accessories.

CAPUT XXIV.

DE FIDE TACITA.

I. *Tacite quomodo fides interponatur.*
II. *Exemplum in eo qui in tutelam recipi a populo aut rege expetit:*
III. *Qui colloquium postulat aut admittit:*
IV. *Huic tamen, dum collocutori non noceat, integrum esse res suas promovere.*
V. *De mutis signis ex consuetudine aliquid significantibus.*
VI. *De tacita approbatione sponsionis.*
VII. *Pœna quando tacite remissa.*

L. ea lege. 51. D. locati. I. SILENTIO quædam conveniri non male a Javoleno dictum est, quod et in publicis, et in privatis, et in mixtis conventionibus usu venit. Causa hæc est, quod consensus, qualitercunque indicatus et acceptatus, vim habet juris transferendi. Signa autem consensus sunt et alia præter voces et literas, ut non semel jam indicavimus. Quædam natura insunt actui. Lib. ii. 4. §§ 4, 5; iii. 1. § 8.

II. Exemplum sit in eo qui aut ab hostibus, aut ab externis veniens in alterius populi, aut regis fidem se dat: nam hic quin tacite se obliget, ne quid faciat adversus eum statum in quo præsidium petit, dubitari non debet. Quare sequendi non sunt qui Zopyri factum a reprehensione remotum aiunt: neque enim fides ejus in regem, perfidiam in eos ad quos con-

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CHAPTER XXIV. *Of Tacit Faith.*

I. It is well said by Javolenus, that some things are agreed upon in silence. This happens in public conventions, and in private, and in mixed. The cause is this; that consent, however indicated and accepted, has the force of transferring right. But there are other signs of consent, besides words and letters, as we have more than once indicated.

II. Some are by nature inherent in certain acts. For an example, take him who coming from the enemy, or from strangers, gives himself into the hands of another people or king. For that such a person tacitly binds himself not to do anything against that state in which he seeks refuge, cannot be doubted. Wherefore they are not to be followed, who say that the act of Zopyrus was free from blame: for his fidelity to his king does not excuse his perfidy towards those to whom he fled. The same must be said of Sextus; the same of Tarquin who went over to Gabii. Virgil speaks of Sinon's treachery and crime.

fugerat excusat. Idem de Sexto Tarquinii filio, qui ad Gabios se contulerat, dictum esto. De Sinone Virgilius: Liv. i. 53. Æn. ii. v. 65.

Accipe nunc Danaum insidias, et crimine ab uno
Disce omnes.

III. Sic et qui colloquium aut postulat, aut admittit, [a]tacite pollicetur, collocutoribus id innoxium fore. Hostibus per colloquii speciem violandis jus gentium violari pronuntiat Livius: addit, colloquium perfide violatum: nam *per fidem* mendose eo loco scribitur. Cn. Domitius eo quod Bituitum regem Arvernorum per colloquii simulationem accersitum, hospitioque exceptum vinxit, hoc a Valerio Maximo judicium refert: *Nimia gloriæ cupiditas perfidum existere coëgit.* Quamobrem mirari subit, cur scriptor libri octavi belli Gallici Cæsaris, sive is Hirtius est, sive Oppius, simile factum T. Labieni referens, adjecerit, *infidelitatem ejus* (Comii scilicet) *sine ulla perfidia judicavit comprimi posse;* nisi hoc Labieni magis quam scriptoris judicium est. Lib. xxxviii. 25. Lib. ix. 6. n. 3. Cap. 23.

IV. At non ultra tacita illa voluntas trahenda est quam dixi: nam dum collocutores nihil patiantur, specie colloquii avertere hostem a belli consiliis, sua interim promovere, perfidia vacat, et dolis bonis annumeratur: quare qui deceptum spe

[a] *Tacite pollicetur collocutoribus id innoxium fore*] Merito Agathias Ragnarim Hunnum culpat, quod abeuntem a colloquio Narsetem telo transfigere voluerit. Agath. Lib. II. (c. 7.)

III. So he who either asks for or grants a parley, tacitly promises that it shall be without damage to the parties parleying. When enemies are harmed under pretence of a colloquy, Livy says that the law of nations is violated: adding, *Colloquium perfide violatum.* So Valerius Maximus, of Cn. Domitius, who had drawn in Bituitus, king of the Arverni, under pretence of a colloquy, and had then thrown him into chains: *Too great greediness of glory made him perfidious.* And hence we must wonder why the writer of the eighth Book of Cesar's Gallic War, whether it be Hirtius or Oppius, relating a similar act of Labienus, adds: *He judged, that his* (Comius's) *faithlessness might be suppressed without perfidy;* except we are to look upon this as the judgment of Labienus, not of the writer.

IV. But this tacit will [or promise] is not to be drawn beyond the limits which I have stated: for provided the collocutors suffer no harm, to turn away the enemy from warlike measures by the appearance of a colloquy, and in the mean time to push on our own designs, has no perfidy in it, and is reckoned among good stratagems. And thus

Liv. xlii. 47. pacis regem Perseum arguebant, non tam juris et fidei, quam animi excelsi et gloriæ bellicæ habebant rationem, ut ex his Lib. iii. 1. § 6. *et seqq.* quæ de dolis bellicis diximus satis potest intelligi. Ejusdem generis erat fraus illa, qua Asdrubal ex Ausetanis saltibus exercitum servavit, et qua Scipio Africanus major situm cas- Liv. xxvi. 17. et xxx. 4. trorum Syphacis perdidicit, utrumque narrante Livio. Quorum exemplum imitatus [b] L. Sylla bello sociali apud Eserniam, Lib. i. 5. n. 17. ut apud Frontinum legimus.

V. Sunt et signa quædam muta ex consuetudine significantia, ut olim vittæ et rami olivarum: apud Macedones hastarum erectio: apud Romanos [c] scuta capiti imposita, [d] signa supplicis deditionis, quæ proinde obligant ad arma ponenda. Qui vero deditionem accipere se significat, an obligetur, et Lib. iii. 4. § 12. et c. 11. § 15. quatenus ex his quæ supra dicta sunt, petendum sit. [e] Hodie

b *L. Sylla*] Et Cæsar Dictator adversus Tencteros et Usipetes. Appianus *Exc. Legat.* n. 16.

c *Scuta capiti imposita*] Appianus *Civilium* II.

d *Signa supplicis deditionis*] Apud Persas manus post tergum complicatæ. Ammianus Lib. XVIII. [Cap. viii. pag. 222. ubi de Assyriis hoc dicitur.] ad quem locum notata Lindebrogii vide: scuta et vexilla perversa apud Romanos, notat idem Ammianus libro XXVI. (cap. x. pag. 512, ubi vide Valesii notam.) Submittere vexilla, Latinus Pacatus *Panegyrico* (c. 36.) Apud Germanos et eorum exemplo alios, herbam porri-

they who complained that Perseus was deceived by the hope of peace, took account, not so much of right and of good faith, as of magnanimity and glory: as may be understood by what we have said of stratagems. Of the same kind was the trick by which Asdrubal saved his army from the Ausetanian jungle; and by which Scipio Africanus Major learnt the situation of the camp of Syphax: both which stories are told in Livy. And these examples are imitated by L. Sylla, in the social war at Esernia, as we read in Frontinus.

V. There are also certain mute signs which have a signification from custom, as formerly fillets and olive-branches; among the Macedonians the raising of spears; among the Romans the placing the shields on the head, the sign of a suppliant surrender; which immediately obliges the persons to lay down their arms. As to him who signifies that he receives the surrender, whether he be obliged, and how far, is to be determined by what we have said above. At present a white flag is a tacit sign of asking for a parley; and binds the askers as much as if they used words.

VI. How far engagements made by generals are to be supposed tacitly approved by the people or the king, we have also discussed above; namely, that it is so to be understood, when the act is known, and anything is done, or not done, of which no other reason can be

vela candida tacitum habent signum petiti colloquii: obligabunt ergo non minus quam si voce petitum esset.

VI. Sponsio a ducibus facta quatenus tacite approbata a populo aut rege censeri debeat, et hoc jam supra diximus, nimirum ubi et actus fuit cognitus, et aliquid factum, aut non factum, cujus rei alia causa extra voluntatem federis probandi dari non possit. Lib. ii. 15. § 17. et iii. 22. § 3.

VII. [f]Pœnæ remissio ex sola dissimulatione non potest colligi; sed opus est accedat actus talis qui aut amicitiam per se ostendat, ut fedus amicitiæ causa, aut opinionem de tali virtute cui merito antefacta condonari debeant, sive ea opinio verbis indicata est, sive rebus quæ ex more institutæ sint ad talem significationem.

gere, Plinius Lib. XXII. c. 4. Qui victi se dedunt inermes supplicant, ait Servius ad I. *Æneid.* (487.)

[e] *Hodie vela candida tacitum habent signum petiti colloquii*] Ignis succensus petiti colloquii signum apud septentrionis populos. Meminit Johannes Magnus et alii. Plinius Lib. XV. 30. *de Lauru: ipsa pacifera, ut quam prætendi etiam inter armatos hostes quietis sit indicium.* (Cap. 30.)

[f] *Pœnæ remissio*] Tractat Polybius servatus in *Excerptis Legationum*, num. 122, an si remissa sit pœna iis qui facinus fecere, simul remissa sit mandatoribus? non puto, singulos enim tenent sua delicta.

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assigned but the will to approve the convention.

VII. The remission of a penalty cannot be collected merely from silence. It is necessary that there be added some act, which either of itself shews friendship, or a league on the ground of friendship, or an opinion of the existence of virtues which may give rise to a condonation of previous acts; whether that opinion be expressed in words, or by means of things which by custom are appointed to convey such meaning.

CAPUT XXV.

CONCLUSIO, CUM MONITIS AD FIDEM ET PACEM.

I. *Monita ad fidem servandam.*
II. *In bello pacem semper spectandam:*
III. *Et amplectendam etiam cum damno, Christianis præsertim.*
IV. *Utile id victis:*
V. *Et victori.*
VI. *Et quorum res dubiæ sunt.*
VII. *Pacem factam summa religione servandam.*
VIII. *Votum et finis operis.*

I. 1 ATQUE hic finire me posse arbitror, non quod omnia dicta sint quæ dici poterant, sed quod dictum satis sit ad jacienda fundamenta, quibus si quis velit superstruere speciosiora opera, adeo me invidentem non habebit, ultro et gratiam referet. Tantum antequam dimitto lectorem, sicut, cum de bello suscipiendo agerem, monita quædam bello quantum fieri potest declinando adjeci, ita nunc quoque monita pauca addam, quæ in bello et post bellum valeant ad fidei

[a] *Feris erunt similes*] Legati Justiniani apud Procopium *Persicorum* II. Chosroën sic alloquuntur: εἰ μὴ πρὸς παρόντα σὲ, ὦ βασιλεῦ, οἱ λόγοι ἐγίγνοντο, οὐκ ἄν ποτε ᾠόμεθα Χοσρόην τοῦ Καβάδου ἐς γῆν τὴν Ῥωμαίων ἐν ὅπλοις ἥκειν, ἀτιμάσαντα μὲν τοὺς διομωμοσμένους σοὶ ἔναγχος ὅρκους, ὃ τῶν ἐν ἀνθρώποις ἁπάντων ὕστατόν τε καὶ ἐχυρώτατον εἶναι δοκεῖ τῆς ἐς ἀλλήλους πίστεώς τε καὶ ἀληθείας ἐνέχυρον· διαλύσαντα δὲ τὰς σπονδὰς, ὧν ἡ ἐλπὶς ἀπολέλειπται μόνη τοῖς διὰ τὴν ἐν πολέμῳ κακοπραγίαν οὐκ ἐν τῷ ἀσφαλεῖ βιωτεύουσιν. οὐ γὰρ ἄλλο οὐδὲν τὸ τοιοῦτον εἴποι τις ἂν εἶναι, ἢ τῶν ἀνθρώπων τὴν δίαιταν ἐς τὴν τῶν θηρίων μεταβεβλῆσθαι· ἐν γὰρ τῷ μηδαμῆ σπένδεσθαι, τὸ πολεμεῖν ἀπέραντα λελείψεται πάντας· πόλεμος

CHAPTER XXV. *The Conclusion, with admonitions to Good Faith and Peace.*

I. 1 And here I think that I may make an end; not that I have said all that might be said, but that enough has been said to lay the foundations; on which, if any one will erect a fairer superstructure, he will be so far from being the object of any grudging on my part, that I shall be grateful to him. Only before I dismiss the reader, as when I spoke of undertaking a war, I added admonitions on the duty of avoiding war as much as possible, so now I will add a few admonitions which may tend in war, and after war, to the preservation of good faith and peace; and of good faith, both on other accounts, and that the hope of peace may not be destroyed. For not only is each commonwealth kept together by good faith, as Cicero says, but that greater society of which nations are the members. If Faith be taken

curam et pacis: et fidei quidem tum propter alia, tum ne spes pacis adimatur. Fide enim non tantum respublica quælibet continetur, ut Cicero dicit, sed et major illa gentium societas: hac sublata, ut vere Aristoteles, *ἀνήρηται ἡ πρὸς ἀλλήλους χρεία τῶν ἀνθρώπων, tollitur quod inter homines est commercium.* *Offic.* ii. 24. *Rhet. ad Theod.* i. 15.

2 Itaque merito idem ille Cicero nefarium esse ait, fidem frangere quæ continet vitam: *sanctissimum*, ut Seneca loquitur, *humani pectoris bonum:* quam tanto magis præstare debent summi hominum rectores, quanto ceteris impunius peccant: itaque fide sublata [a]feris erunt similes, quarum vim omnes exhorrent. Et justitia quidem in ceteris suis partibus sæpe habet aliquid obscuri: at fidei vinculum per se manifestum est, imo ideo quoque usurpatur ut de negotiis omnis dematur obscuritas. *Orat. pro Rosc. com.* c. 6. *Epist.* 88. p. 390.

3 Quo magis regum est religiose hanc colere, primum conscientiæ, deinde et famæ causa, qua stat regni auctoritas. Ne dubitent igitur, eos qui ipsis fallendi artes instillant, id ipsum facere quod docent. Non potest diu prodesse doctrina,

δὲ, ὁ πέρας οὐκ ἔχων, ἐξοικίζειν τῆς φύσεως τοὺς αὐτῷ χρωμένους ἐς ἀεὶ πέφυκεν. *Nisi ad te præsentem, rex, hæc haberetur oratio, nunquam putassemus Chosroën Cabadæ filium cum armis intraturum in fines Romanos, contemtis primum juramentis juratis, quod inter homines summum firmissimumque creditur veritatis et fidei pignus; ruptis præterea federibus, quæ sola spes relinquitur iis qui ob belli mala non in tuto vivunt. Quid enim hoc aliud esse dicamus, quam hominum vitam in ferarum vitam mutare? nam sublatis federibus sequetur ut omnes inter se æterna gerant bella. Bella autem sine fine hanc vim habent, ut homines perpetuo teneant naturæ suæ extorres.* (Cap. 10.)

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away, as Aristotle says, *the intercourse of men is abolished.*

2 Therefore Cicero rightly says, that it is atrocious to break that faith which holds life together; *the holiest good of the human heart,* as Seneca speaks. And this, the supreme rulers of mankind ought to be more careful of preserving, in proportion as they have more impunity for their violations of it: so that if faith be taken away, they will be like wild beasts, whose strength is an object of general horror. And in other parts of its sphere, justice has often somewhat that is obscure; but the bond of good faith is manifest of itself, and indeed is used to remove obscurity from all other matters.

3 And therefore it is especially the office of kings, to cherish good faith; first, for the sake of conscience, and then, for the sake of good opinion, by which the authority of kingdoms stands. Let them be certain therefore that they who instil into them acts of deceit, are

quæ hominem hominibus insociabilem facit: adde et Deo invisum.

II. Deinde in tota belli administratione non potest securus et Deo fidens animus retineri, nisi semper in pacem prospectet. Verissime enim dictum a Sallustio: *sapientes pacis causa bellum gerere:* cui congruit Augustini sententia: *non pacem quæri, ut bellum exerceatur, sed bellum geri, ut pax acquiratur.* Ipse Aristoteles non semel accusat gentes quæ bellicas actiones quasi pro ultimo [1]fine sibi proponerent. Ferinum quiddam vis est, quæ in bello maxime eminet: quo diligentius curandum est ut humanitate temperetur, ne nimium feras imitando dediscamus hominem.

Orat. ad Cæs. i. 40. *Epist.* 205. *ad Bonif.* vii. *Pol.* ii. et xiv.

III. Pax ergo tuta satis haberi si potest, et malefactorum et damnorum et sumtuum condonatione non male constat: præcipue inter Christianos, quibus pacem suam Dominus legavit. Cujus optimus interpres nos vult, quantum fieri potest, quantum in nobis situm est, cum omnibus pacem quærere. Viri boni est initia belli invitum suscipere, extrema non libenter persequi: ut apud Sallustium legimus.

Rom. xii. 18. *Immo apud* Cicer. *Epist. ad Famil.* iv. 7.

IV. Satis quidem hoc unum esse debet, sed et plerumque

[1] Ante Stagyritam, Præceptor ipsius PLATO jam id vituperaverat, loco insigni, ubi boni Legislatoris esse ait, pacis caussa potius ea quæ pertinent ad bellum, quam negotia pacis belli caussa ordinare, et ad bellicas rationes revocare: Οὔτ' ἂν νομοθέτης ἀκριβὴς, εἰ μὴ χάριν εἰρήνης τὰ πολεμοῦ νομοθετοῖ μᾶλλον, ἢ τῶν πολεμικῶν ἕνεκα τὰ τῆς εἰρήνης. *De Legib.* Lib. I. pag. 628 E. Tom. II. *Ed. H. Steph. J. B.*

[b] *Aristoteles sic enunciat*] Philo vero *de Constitutione Principis* (pag. 733 D. *Ed. Paris.*) hunc in modum: εἰρήνη κἂν ᾖ σφόδρ' ἐπιζήμιος, λυσιτελεστέρα πολέμου· *pax quamvis cum magno detrimento, bello utilior.* [Locus ARISTOTELIS reperitur in *Rhetor. ad Alex.*

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themselves the deceivers they would make *them.* Doctrines cannot long work well, which make man unfit for society with man; and we may add, hateful to God.

II. In the next place, a mind serene and trusting in God cannot be retained in the whole administration of a war, except it always look to peace. As Sallust most truly says, *Wise men carry on war for the sake of peace:* and to this the opinion of Augustine agrees; and of Aristotle. It is a ferine force which is prominent in war; and must be tempered with humanity, that we may not cease to be men, by imitating brutes.

III. If therefore a peace sufficiently safe can be had, it is not ill secured by the condonation of offenses, and damages, and ex-

utilitas humana eodem trahit: primum eos qui minus valent: quia periculosum est longum cum valentiore certamen, et, ut in navi fit, jactura aliqua redimenda major calamitas, omissa ira ac spe fallacibus, ut recte Livius dixit, auctoribus. Hunc Lib. vii. 40. sensum [b]Aristoteles sic enuntiat: κρεῖττον τοῖς κρείττοσι μέρος τι τῶν ὑπαρχόντων προέσθαι, ἢ πολέμῳ κρατηθέντας αὐτοὺς αὐτοῖς χρήμασιν ἀπολέσθαι· *satius est his, qui plus pollent, aliquid rerum suarum relinquere, quam bello victos cum rebus perire.*

V. Sed et eos qui validiores sunt: quia bonis suis rebus, ut idem Livius non minus vere ait, ampla ac speciosa dantibus pax est: ac melior tutiorque quam sperata victoria. Lib. xxx. 30. Cogitandus enim Mars communis: διεξιτέον, ait Aristoteles, τὰς μεταβολὰς τὰς ἐν πολέμῳ ὡς πολλαὶ καὶ παράλογοι γίνονται· *cogitandum in bello quam multæ quamque improvisæ mutationes accidere soleant.* In oratione quadam pro pace [2]apud Diodorum culpantur οἱ τὸ μέγεθος τῶν εὐημερημάτων προσφερόμενοι, ὥσπερ τῆς τύχης οὐκ ἐναλλὰξ εἰθισμένης βραβεύειν τὰ κατὰ πόλεμον προτερήματα· *qui rerum gestarum a se magnitudinem extollunt, plane quasi*

cap. 3. unde etiam petitus est alter, quem Auctor adfert in paragrapho sequenti. *J. B.*

[2] Oratio illa erat *contra Pacem*, non *pro Pace:* nimirum Demagogi cujusdam Atheniensis Cleophontis, qui ipse *rerum gestarum* ab *Atheniensibus magnitudinem extollebat,* ut vulgus ad bellum concitaret. Hujus autem argumenti imbecillitatem prudenter ostendit DIODORUS SICULUS, cujus ipsius verba illa sunt, ὥσπερ τῆς τύχης, &c. *Biblioth. Hist.* Lib. XIII. cap. 53. pag. 359. *Ed. H. Steph.* Unde patet, Auctorem nostrum, memoriæ vitio, aut festinantem, in loco isto laudando lapsum esse. *J. B.*

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penses: especially among Christians, to whom the Lord has given his peace as his legacy. And so St Paul, his best interpreter, exhorts us to live at peace with all men. As Sallust says, A good man takes up the beginning of war reluctantly, and does not follow its extremes willingly.

IV. This of itself ought to be enough; but often human Utility draws men the same way: those first who are the weakest; for a long struggle with a more powerful adversary is perilous; and as in a ship, we must avert a greater calamity by some loss, putting away anger and hope, fallacious advisers, as Livy says. So Aristotle.

V. But also this is for the benefit of the stronger: for as Livy also says, To them peace, if they grant it, is bounteous and creditable,

non is mos esset fortunæ belli prospera vicibus largiri. [c]Et maxime metuenda desperantium audacia, tanquam acerrimi morientium belluarum morsus.

Bell. Civ. iii. 10.

VI. Quod si uterque pares sibi videantur, id vero, Cæsare auctore, optimum tempus de pace agendi, dum sibi uterque confidit.

VII. Pax autem facta qualibuscumque legibus, servanda omnino ob eam, quam diximus, fidei sanctimoniam, soliciteque cavenda non tantum perfidia, sed et quidquid animos exasperat. Nam quod de privatis amicitiis dixit Cicero, ad has publicas non minus recte aptes: quæ cum omnes summa religione ac fide tuendæ, tum eæ maxime quæ ex inimicitiis revocatæ sunt in gratiam.

Apud Hier. *Apol. adv. Rufin.* Lib. i. *init.*

VIII. Inscribat hæc Deus (qui solus hoc potest) cordibus eorum, quorum res Christiana in manu est, et iisdem mentem

[c] *Et maxime metuenda desperantium audacia*]:
Δειναὶ γὰρ καὶ κοῖται ἀποιχομένοιο λέοντος.
Quippe timenda etiam morientis lustra leonis.
[Hunc versum, qui Veteris cujusdam Poetæ esse videtur, noster habet a Plutarcho, in *Vit. Marii*, sub finem, (pag. 432 c. *Ed. Wech.*) ubi alio ordine leguntur duæ voces, κοῖται καὶ, non καὶ κοῖται: et vox ἀποιχομένοιο exponitur ab Interprete *abeuntis*, non *morientis.* Hæc tamen versio Auctoris nostri potest defendi. Vide quæ diximus in Notis Gallicis ad h. l. in Addend. *J. B.*]

[d] *Homines, Deo carissimum animal*] Sic Chrysostomus sermone *de Eleemosyna* (Tom. vi. pag. 927. *Edit. Savil.*) ἄνθρωπος τὸ περισπούδαστον ζῶον τῷ Θεῷ. [Addamus hominis Ethnici testimonium. Is est Simplicius, qui Hominem vocat, non inhonoratam neque vilem Dei possessionem, οὐκ ἄτιμον οὐδ'

and better than a victory merely hoped for. For they must recollect that Mars is on both sides. So Aristotle. And so in the oration for peace in Diodorus. And there is much to be feared from the courage of despair, like the dying bites of a wild beast.

VI. If the two parties reckon themselves equal, then, as Cæsar holds, is the best time for treating of peace, since each trusts in himself.

VII. Peace made on any conditions whatever is, by all means, to be kept, on account of the sacredness of good faith, of which we speak; and care must be had to avoid, not only perfidy, but anything which may exasperate the mind of the other party. For what Cicero says of private friendships, you may adapt also to public ones; that as all such connexions are to be maintained with the utmost conscience and good faith, so especially those in which a reconciliation has taken place of a previous enmity.

VIII. May God write these lessons—He who alone can—on the hearts of all those who have the affairs of Christendom in their

divini humanique juris intelligentem duit, quæque semper cogitet lectam se ministram ad regendos [d]homines, Deo carissimum animal.

εὐτελὲς τοῦ Θεοῦ κτῆμα. Pag. 239. *Ed. Lugd. B. Salm.* Ubi PLATONIS vestigia sequitur, qui statuit, Homines esse ἓν τῶν κτημάτων τοῖς Θεοῖς. In PHÆDONE, pag. 62 B. Tom. I. *Edit. H. Steph.* Diserte vero PHILO, Judæus, Græce idem, quod heic Auctor noster Latine: Ζῶον τὸ θεοφιλέστατον ὁ Ἄνθρωπος, &c. *De Somniis*, pag. 581 E. *Edit. Paris. J. B.*]

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hands: and may he give to those persons a mind fitted to understand and to respect Rights, divine and human; and lead them to recollect always that the ministration committed to them is no less than this;—that they are the governors of Man, a creature most dear to God!

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